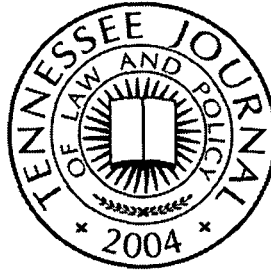


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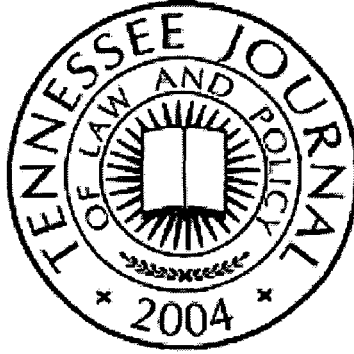
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**TENNESSEE JOURNAL OF LAW AND POLICY  
AND  
CENTER FOR ADVOCACY AND DISPUTE RESOLUTION**

**SYMPOSIUM**

**“THE POLITICS OF PROTECTING CHILDREN”**

**FRIDAY, APRIL 1, 2011**

**THE UNIVERSITY OF TENNESSEE  
COLLEGE OF LAW**



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### WELCOME AND INTRODUCTIONS

DOUG BLAZE: I'm Doug Blaze, the Dean of the UT College of Law. I want to welcome everybody here today to this incredible program on the politics of protecting children. A symposium like this really represents the best in our law school and what we're trying to do. What we're about is trying to connect the theory that our students learn in the classroom through their textbooks and apply it in a real world setting, or at least explore with folks from the profession what's going on in terms of what they've learned and how it actually applies in real life. We do that through our clinical programs; we do it through field placements; we do it through our simulation classes; and we do it through symposia like this. I think that's a wonderful way for our students to see what's going on. It's also a wonderful way for the law school to bring folks together to talk about what I consider to be a vitally important issue. Most of you probably know that our clinical program and various faculty members for years have been involved in these issues, and so we're very pleased to welcome you.

I applaud the *Tennessee Journal of Law and Policy* for having come up with this particular topic and idea. It's also a great collaboration between the *Tennessee Journal of Law and Policy* and the Center for Advocacy, so I want us to thank the Center for Advocacy, Corinna, and particularly the incomparable Professor Penny White for helping to put this together. I want to applaud and thank the editor-in-chief, John Evans, who you'll hear from in a second, and especially the symposium editor, Jessica Van Dyke, for putting this together. I also want to thank all the panelists, the rest of you in the audience, and the students for being here. It is a terrific day. I think it will be great. So let's get started.

JOHN EVANS: Thank you, Dean Blaze. I'm John Evans. I'm the editor-in-chief of the *Tennessee Journal of Law and*

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*Policy.* We're just absolutely thrilled that you're here. We came up with this topic a while back and our biggest worry was that people might not be interested. But, if you look around, obviously it's a topic that means a whole lot to this community and people across this state. We have wonderful presentations from a variety of different speakers today, so we hope you're here for the whole day if you can, and ask as many questions as you like. Again, thank you so much for coming. Now Jessica Van Dyke is going to introduce our first panel.

JESSICA VAN DYKE: Good morning. I'm Jessica Van Dyke. I'm the Symposium Editor for the *Tennessee Journal of Law and Policy*. I think any symposium about child law has to start with a little bit of Dr. Seuss. He said, "The more that you read, the more things you will know; the more that you learn, the more places you'll go." For us sitting here in this room today, there is a good chance that we have fond memories of our parents reading from this or another of Dr. Seuss's books to us as children. But as we all know too well, not all children have these opportunities. That's why we're here today. I am thrilled that so many practicing attorneys took time out of their schedules to sign up and attend today's symposium. I think the numbers say very promising things about the future of service to children in the state of Tennessee.

This Dr. Seuss motto really guided the *Journal* as we planned and orchestrated this symposium. The motto that, as future attorneys, the more that we know and the more that we read, the more places we can go in protecting children in the future. I have to say the very best aspect of planning this symposium has been the enthusiasm and the dedication of the individuals asked to sit on panels or for their input, and of those who simply just said, "We're so glad you're having this symposium today." The feedback we have received over the past several months has been incredibly positive, with individuals from the legislature,

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the legal field, nonprofits, academia, and social services all supporting our efforts to put together a day where advocates could really discuss what has already been done, what worked and what didn't, and what should be done in the future. Today, we have some outstanding speakers for you. I'm so excited. I think it's going to be a great day. At the end of each session we're going to have a question and answer period, and I would encourage each of you to ask questions and to share your thoughts with the panelists, because the more we learn, the more places we can go. Thank you so much for being here.

Let's move on to panel one. We have a great line-up today. We have Ms. Jennifer Evans Williams, who joins us from Springfield, Tennessee, and she is a certified child law specialist. We have Ms. Elizabeth Sykes from the Administrative Office of the Courts in Nashville, Tennessee. And all the way from Memphis, we have Ms. Lucie Brackin of the Landers Firm. She is on the Rule 40A<sup>1</sup> work group for the Tennessee Supreme Court. So thank you all so much for being here and I'll turn it over to you.

### **PANEL DISCUSSION 1: TENNESSEE SUPREME COURT RULE 40A**

*Elizabeth Sykes*  
*Lucie Brackin*  
*Jennifer Evans Williams*

ELIZABETH (LIBBY) SYKES: Thank you very much. My name is Libby Sykes. I'm the director of the Administrative Office of the Courts in Nashville, and it is my pleasure to be here today. We're going to talk a little bit about Rule 40A, which governs the appointment of guardians ad litem in parenting cases. When we were

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<sup>1</sup>TENN. SUP. CT. R. 40A.

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talking about the program and how we wanted to present it today, it was decided that I was not as much the expert on the day-to-day application of the rule as Jennifer and Lucie are, so I will start with a little bit about the evolution of this rule and how it got started.

On August 27, 2007, almost four years ago now, I was in my office. I had several staff members who were attending a hearing before the General Assembly's House Children and Family Affairs Committee, and I remember when the phrase "impeaching a judge" came up, I thought, "Well, I guess I'd better go across the street and see what all is going on." I knew that we were having a hearing on the use of guardians ad litem. There were probably four women testifying from Shelby County, and all of them were going through very high-conflict divorces. All of them had had guardians ad litem, or in some instances attorneys ad litem, appointed in their cases. They all had some common complaints about the role of a guardian ad litem, the duration of appointment, and the cost. All of them had guardian ad litem fees in excess of \$30,000, and one was far in excess of \$100,000. They all complained of instances where they were assessing the guardian ad litem fees as child support. They also talked about the use of the guardian ad litem reports. In one instance, there was actually an attorney at litem appointed to represent the guardian ad litem.

One of the parties was a woman by the name of Mrs. Susie Andrews, who was going through a divorce in Shelby County. At that time her divorce had not been tried. Several months after this hearing, the case was tried by Senior Judge Kurtz from Davidson County, who was brought in to hear the case. Dr. Andrews was a physician, and he and Mrs. Andrews had been married about eleven years and had one child. They decided they were going to get a divorce, and I don't know what all that transpired before that, but during this case Dr. Andrews asked that a guardian ad litem be appointed.

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Before I start reading from some of the orders that Judge Kurtz entered relating to this, I wanted to say, first of all, that Judge Kurtz said in this order there was no criticism of the efforts of the guardian ad litem or the attorney ad litem, and that they both conducted themselves in a highly professional manner and performed the role they assumed. The issue was not whether their intentions were good but, rather, did they exceed the boundaries drawn by the law for their respective roles? Now I'm going to go back and look at this opinion,<sup>2</sup> because it talks about the role of the guardian ad litem and how the role of the guardian ad litem was viewed in the culture of Shelby County. It said that on December 17, 2008, the guardian ad litem and attorney ad litem filed a motion to set and assess fees. As near as the Court can compute, the guardian ad litem had already been paid fees in around \$71,000 and contends she is owed another \$99,400, for a total of \$170,000. The attorney ad litem has already been paid around \$30,000 and seeks an additional \$69,800, for a total of about \$100,000.<sup>3</sup> He also writes earlier in this opinion that the attorney fees, the guardian ad litem fees, and the attorney ad litem fees all were in excess of a million dollars in this divorce of an eleven-year marriage involving one child.<sup>4</sup>

I would also like to mention that in this divorce, both the parties agreed to the appointment of both the attorney ad litem and the guardian ad litem. So it's not the initial appointment order at issue, but rather while the case was pending, what the role of the guardian ad litem was. Judge Kurtz said in his order that while the case was pending, the guardian ad litem served as mediator, arbitrator, and decision-maker and attempted to dissolve

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<sup>2</sup>Andrews v. Andrews, \_ S.W.3d \_, 2010 WL 3398826 Aug. 31, 2010, *appeal denied* Tenn. Ct. App. Mar. 9, 2011.

<sup>3</sup>*Id.* at \*15.

<sup>4</sup>*Id.* at \*11.

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disputes between the parties. It describes how the guardian ad litem interviewed twenty people and ultimately submitted a report that with the exhibits and other things that were attached was almost 300 pages long.<sup>5</sup> In his order, Judge Kurtz cites to a previous opinion, *Toms*,<sup>6</sup> that talks about what the proper role of a guardian ad litem is, and he concludes that some of the cases in Shelby County had far exceeded what a guardian ad litem's proper role is. Judge Kurtz wrote that during the hearing on what fees should be awarded to the guardian ad litem, there was an affidavit from an attorney in Shelby County who was often appointed as a guardian ad litem who said the role that the guardians had actually assumed speaks to an expectation which does not appear in any court order and expresses a role beyond what is authorized by legal authorities referenced.<sup>7</sup> He also writes that it also appears a legal culture had developed in the 30th Judicial District,<sup>8</sup> in which the guardians ad litem assumed authority beyond the parameters set forth in case law.

However, he says, when push comes to shove, law must trump culture. He talks about the guardian ad litem in the case, and says that she became an active participant in the poisonous dynamic between the parties, that she became a mini judge, and that her relationship with Mr. Andrews was so estranged that she had to procure her own attorney because she, for all practical purposes, became a third party to what was a two-party divorce.<sup>9</sup> He ultimately reduced her fee and awarded her an additional \$7,500, and I think gave the attorney ad litem \$5,000.<sup>10</sup>

These were some of the things that the parties were speaking of during that hearing on August 27, 2007. As I

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<sup>5</sup>*Id.* at \*7.

<sup>6</sup>*Toms v. Toms*, 209 S.W.3d 76 (Tenn. Ct. App. 2005).

<sup>7</sup>*Andrews*, 2010 WL 3398826 at \*12.

<sup>8</sup>The 30th Judicial District of Tennessee encompasses Shelby County.

<sup>9</sup>*Andrews*, 2010 WL 3398826 at \*5, \*14.

<sup>10</sup>*Id.* at \*14.

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said, this divorce had not been tried at that time; this order had not been entered. After that hearing, during the 2008 legislative session several bills were introduced basically to prohibit the appointment of guardians ad litem in these types of cases. There was considerable discussion about impeaching judges. We knew that wasn't going anywhere, and that it was just a lot of discussion, but members of the Supreme Court, I remember particularly then Chief Justice William Barker, met with the chairman of the House Children and Family Affairs Committee, Mr. John Berry from Memphis, and asked Representative Berry if he would allow the Supreme Court to implement a rule rather than the General Assembly just passing a law that basically did away with the court's discretion to appoint a guardian ad litem.

After that session, they allowed the Court that time. After numerous meetings with judges and other parties, the first Rule 40A was filed on April 1, 2008, for public comment. That public comment period ended on June 30, 2008. On May 1, 2009, almost a year later, the first rule went into effect.<sup>11</sup> That rule was a provisional rule, meaning it had a one-year application. On April 30, 2010, the Supreme Court entered an order extending the effective date of that rule until December 31, 2010.<sup>12</sup> Also, on August 2, 2010, the Supreme Court entered an order appointing the Rule 40A work group that Ms. Brackin was

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<sup>11</sup>See *In Re: Order Establishing Tenn. Sup. Ct. R. 40A, Appointment of Guardians Ad Litem in Custody Proceedings*, M2009-01926-SC-RL2-RL (filed Feb. 17, 2009), *available at* [http://www.tncourts.gov/sites/default/files/rule\\_40a\\_order\\_2-17-09.pdf](http://www.tncourts.gov/sites/default/files/rule_40a_order_2-17-09.pdf) (hereinafter "Order Establishing").

<sup>12</sup>*In Re: Tenn. Sup. Ct. R. 40A, Extension of Effective Date*, M2009-01926-SC-RL2-RL (filed Apr. 30, 2010), *available at* [http://www.tncourts.gov/sites/default/files/order\\_extending\\_comment\\_period\\_and\\_exp\\_date\\_of\\_rule40a.pdf](http://www.tncourts.gov/sites/default/files/order_extending_comment_period_and_exp_date_of_rule40a.pdf).

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on.<sup>13</sup> The court set another comment deadline of November 30th, 2010. On December 15th, 2010, the work group submitted its report.<sup>14</sup> On January 21st, 2011, the Supreme Court published the work group's report for public comment and also extended the effective date of the provisional rule which was filed on May 1st, 2009, until further orders of the court.<sup>15</sup> They also put in another public comment period on the work group's report, which ended on March 14th, 2011.<sup>16</sup> We would anticipate in the next few months that the Supreme Court will act on the work group's report.

So that is the evolution of this provisional rule. I'd like to turn it over to Lucie Brackin. Lucie was a member of the Rule 40A work group, which was chaired by Professor Janet Richards from the University of Memphis School of Law, and I think that Lucie is going to go through the rule and some of the changes the work group has suggested and some of the concerns that they had with the original rule that was filed.

LUCIE BRACKIN: Thank you, Libby. It was such an honor to be asked to participate in the work group. I've been in private practice in Memphis since 2002, and I have served as a guardian ad litem and as an attorney who was appointed a guardian ad litem, so I was quite honored to be asked to serve along with two other private practice attorneys and several judges and magistrates from across Tennessee. I think the point in the makeup of the group was to get representatives from all across the state. I know that all of the ladies that testified at the August 27, 2007 hearing

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<sup>13</sup>See In Re: Tenn. Sup. Ct. Rule 40A, M2009-01926-SC-RL2-RL (filed Jan. 21, 2011), *available at* [http://www.tncourts.gov/sites/default/files/rule\\_40a\\_final\\_comment\\_and\\_extension\\_order.1.21.11.pdf](http://www.tncourts.gov/sites/default/files/rule_40a_final_comment_and_extension_order.1.21.11.pdf) [hereinafter 40A Work Group].

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*



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were related to Shelby County or our area, and so I know it was important for the committee to have representatives from Shelby County. I was on there, along with Chancellor Arnold Goldin, from our county.

First, I want to talk about the process we used to formulate our proposed rule. Before I did this, I had no idea what went into something like this. One of our first meetings was in August, and we decided that we would set up regular conference calls monthly so that we could make sure and stay on track to get everything done by December. But, you know lawyers: you set your pretend deadline and then you have your real deadline. With each conference call, we would all put in our suggestions. We decided that we would go through the provisional rule section by section, make our modifications to it, and then submit that as a proposal to the Supreme Court. There was a wonderful lady at the courts, Mary Rose, who did a lot of the typing up of our meetings and doing the different drafts and circulating them around, and everyone would review them before we had our next call. The result was the order that we proposed to the court.

We tried to go back to our respective bars and get feedback from our members. Particularly I had some friends that worked within a work group within the TBA,<sup>17</sup> and they did an excellent job with their suggestions. I was sort of a liaison to let the committee know what they thought should be changed. I also had individual one-on-one discussions with the members of the bar about the real problems. The majority of the feedback was that we should have guardians ad litem limited to licensed attorneys. We wanted all the ethical obligations that went along with being an attorney to apply to those serving as guardians ad litem. The other big problem was in Section 9,<sup>18</sup> which was the “Participation in Proceeding” section that detailed what

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<sup>17</sup>Tennessee Bar Association.

<sup>18</sup>TENN. SUP. CT. R. 40A, §9.

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the guardian ad litem was supposed to do. There was a discrepancy between what Section 9 used to say and what other sections of the provisional rule seemed to say. I thought I might go through the rule and explain where we got the changes that we wanted to make. In Section 1,<sup>19</sup> our big change was to limit the definition of a guardian ad litem to a licensed attorney instead of a CASA<sup>20</sup> volunteer or another professional who the court could appoint, because that was a big change that the provisional rule made. We also put a commentary in there that the same attorney who was a Rule 40<sup>21</sup> guardian ad litem could also be a 40A guardian ad litem.

One thing that we felt in Section 2<sup>22</sup> was extremely important was what was going to happen to ongoing cases. At the time that the new rule would go into effect, we wanted the court to be able to reappoint a guardian to serve under the new rule rather than the old rule. I know that from my bar, people are waiting to see what happens before they appoint or seek to appoint a guardian ad litem. I have a case right now that I have put on hold, and I'm not going to seek a guardian ad litem appointment until the new rule goes into effect, because I feel right now a guardian is powerless and can't even get any information to the court unless one of the parties calls them as a witness. One of my good friends in Memphis right now is a guardian ad litem. She has done an investigation and has made internal recommendations to the attorneys. Well, neither side likes the recommendations, so that guardian is not going to be called. She has done this work, put in all this effort, and can't even get her information to the judge. I think that's a real problem.

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<sup>19</sup>TENN. SUP. CT. R. 40A, §1.

<sup>20</sup>Court-Appointed Special Advocate.

<sup>21</sup>TENN. SUP. CT. R. 40.

<sup>22</sup>TENN. SUP. CT. R. 40A, §2.

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We also wanted to change the language in Section 3 under the appointment section, in paragraph (c), to “the court *should* consider” and not “*shall* consider.”<sup>23</sup> Not all of these factors are applicable to each situation, and we wanted the court to have the discretion to consider what the court wanted. Also, in several of the comments, we needed that catch-all paragraph at the end: “any other factors necessary to address the best interest of the child.” You just can't plan for everything, and we wanted to have that as a way for the judge to consider something that you couldn't have foreseen.

We took out paragraph (d) of Section 4,<sup>24</sup> because if the guardian is going to be an attorney, there are ethical rules that have to be followed regarding any sort of conflict of interest, and it was no longer necessary. We took that section out, and we made (e) the new (d).<sup>25</sup> What we really worried about, particularly from Shelby County, is a situation where a guardian is agreed to by both the parties and the guardian does an investigation, puts all this work in, interviews witnesses, and then at the end a party says there was a conflict or comes up with all these complaints about the guardian because they don't like the final result. That's why we put “raised without delay” and “should be addressed,”<sup>26</sup> because we've had situations where at the end of the case, a new attorney becomes involved, and they say there was an issue with the guardian. Well, if they didn't raise it in the beginning, then they shouldn't be allowed to raise it in the end—unless, of course, there is a conflict between the new attorney and the GAL; however, this should have been raised before or when new counsel substituted in. So that's why we wanted that to be in there.

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<sup>23</sup>TENN. SUP. CT. R. 40A, §3(c); *see also* 40A Work Group, *supra* note 13, App. at 2.

<sup>24</sup>TENN. SUP. CT. R. 40A, §4(d); *see also* 40A Work Group, *supra* note 13, App. at 4.

<sup>25</sup>*See* 40A Work Group, *supra* note 13, App. at 4. °

<sup>26</sup>*Id.*

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Next under Section 6, “Role of Guardian Ad Litem,”<sup>27</sup> one of the main complaints out of Shelby County was that the guardians were assuming judicial roles in the parties' situations and were arbitrating. We know now that there cannot be any arbitration of parenting issues because of *Tuetken*,<sup>28</sup> which I believe cert has been filed to the United States Supreme Court on that case. Under this proposed Rule 40A, we put under (b) that “the guardian ad litem shall not function as a special master for the court or perform any judicial or quasi-judicial responsibilities,”<sup>29</sup> because there were a lot of complaints that the guardians had too much power. Under Section 7,<sup>30</sup> regarding access to the child, you might have thought that it was a no-brainer that the guardian would be able to talk to a child without a parent being present. Well, there were parents who were insisting on being present. We put in here under subparagraph one that the guardian should have access to the child “without the presence of any other person unless otherwise ordered by the court,”<sup>31</sup> so that the court can be involved if that was an issue.

Under Section 8<sup>32</sup> we wanted to include the duties and responsibilities from Rule 40. Also, we thought the way that Section 8 was set up was confusing and paragraph (c) was unnecessary, so we redid the way that was organized. Also, under new subparagraph (c) of that section, we wanted to make it clear that there was no authority for an appointment of an attorney ad litem.<sup>33</sup> Before the *Andrews* case<sup>34</sup> came down from Judge Kurtz, it

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<sup>27</sup>TENN. SUP. CT. R. 40A, §6.

<sup>28</sup>*Tuetken v. Tuetken*, 320 S.W.3d 262 (Tenn. 2010), *cert. denied*, 2011 U.S. LEXIS 3645 (U.S. May 16, 2011).

<sup>29</sup>See 40A Work Group, *supra* note 13, App. at 4.

<sup>30</sup>TENN. SUP. CT. R. 40A, § 7.

<sup>31</sup>40A Work Group, *supra* note 13, App. at 5.

<sup>32</sup>TENN. SUP. CT. R. 40A, §8.

<sup>33</sup>See Rule 40A Work Group, *supra* note 13, App. at 5-7.

<sup>34</sup>*Andrews*, 2010 WL 3398826.

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was the accepted practice in Shelby County that if a guardian ad litem was being attacked by one of the attorneys, the guardian ad litem could have the protection of an attorney ad litem to defend and represent them. There was a situation where a guardian was deposed, and it was ugly. That really is more of a civility problem than a problem within the rule, but in response we wanted to make it clear that there would be no authority for the appointment of an attorney ad litem. For situations where the child's preference was in contrast to what really was best for the child, there had been an argument to allow in section (c) the appointment of an attorney ad litem to represent the preference of the child and then a guardian ad litem to represent the best interest of the child. We felt that just wasn't necessary, and that the guardian could outline for the court what the preference of the child was as well as well as advocate for the best interest of the child.

Section 9<sup>35</sup> was the other biggie. Once we decided that we wanted to limit who could be a guardian ad litem to an attorney and said that the guardian ad litem could take all actions that an attorney could, we eliminated most of the language in Section 9 and just said "all rights and privileges accorded to an attorney."<sup>36</sup> But one thing that we definitely wanted in there was for the guardian ad litem to be able to participate in every hearing and in alternative dispute resolution proceedings. I have found that a guardian ad litem can be instrumental in formulating a settlement, and nine times out of ten it is in the best interest of the children for a settlement to be reached. That's an important part of what a guardian ad litem should do: if a settlement could be facilitated and that guardian is in a position to help, then they need to and should do that. Under the commentary, we specifically wanted to state that the guardian ad litem may not be a witness or testify unless there are extraordinary

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<sup>35</sup>TENN. SUP. CT. R. 40A, §9.

<sup>36</sup>See Rule 40A Work Group, *supra* note 13, App. at 7.

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circumstances, and that there wouldn't be a report and recommendation to the court. In lieu of that, the guardian may file a pretrial brief or memorandum. There has to be a way to get the information to the court, and so we wanted to do that through a pretrial brief or memorandum. We didn't want there to be any ambiguity, so we just stated definitively in subparagraph (3)<sup>37</sup> that the guardian would present the results in the same manner as a lawyer presents a case—by calling witnesses, submitting evidence, and making arguments. That was a big change that we made from the provisional rule.

Of course, the fees and expenses section also had to be addressed.<sup>38</sup> I would invite you to read those opinions that ultimately came out in the cases of the ladies who testified, and you will see there were a lot of problems. Those cases were extremely unusual and extremely acrimonious. If you look at the *Andrews* case,<sup>39</sup> you can see the fees that the guardian and the attorney ad litem had are only a drop in the bucket compared to the fees that were spent on the attorneys in that case. We wanted to give the court a way to monitor fees, and we had a lot of discussion on that issue. There was a suggestion that the guardian should have to submit a fee request each month to the court to get paid. I felt like that would add even more time, because the guardian ad litem would have to file a motion or present it, give notice, go to court and argue it every single month, and that would just escalate fees unnecessarily. What we decided to do was to have an initial retainer paid. We had discussion about whether the retainer should be paid to the court. Well, if it's paid into the court, you've got to go to the court to get paid. So if the parties agreed to put that in the guardian ad litem's escrow account, after the retainer was depleted, the guardian would have to

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<sup>37</sup>See Rule 40A Work Group, *supra* note 13, App. at 9.

<sup>38</sup>TENN. SUP. CT. R. 40A, §11.

<sup>39</sup>*Andrews*, 2010 WL 3398826.

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go back to the court to address getting an additional retainer at that point. Of course, the order has to lay out the manner of payment, the hourly rate, the dates of deposit, and also whether periodic payments would be drawn from that account, and the guardian has to give notice to the parties of every withdrawal.

I was shocked to even imagine that a guardian wouldn't submit a monthly bill. I would think that would have been a completely regular occurrence, but surprisingly not. In the order we've included that the guardian has to give notice to the parties of a withdrawal, a statement of services supported by an affidavit, and also give the parties time to object before a withdrawal would be made. We also wanted to make sure in paragraph (f)<sup>40</sup> that we added that even if an objection is not made, at each monthly or periodic payment withdrawal, a party could still address the reasonableness of the guardian ad litem's fees at the end of a case. It may be that a party doesn't realize until the end that a guardian is doing way too much work or overbilling, and we wanted to put in here that there could be an objection made at the end of the case.

We had a lot of discussion about Section 12,<sup>41</sup> about appeals by a guardian ad litem. We talked about whether a guardian ad litem could initiate an appeal. If a parent is not initiating an appeal, then we didn't feel a guardian should initiate an appeal of a court decision. We did want the guardian to have the ability to appeal if there was a ruling on fees or the reasonableness of fees, and we referred back to Section 4(d) and Section 11(h).<sup>42</sup>

After we submitted our rule, the court made relatively minor suggestions, and one of them was to leave the effective date blank for the court to fill in. That's what went into the committee's suggestions to improve 40A.

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<sup>40</sup>See 40A Work Group, *supra* note 13, App. at 11.

<sup>41</sup>TENN. SUP. CT. R. 40A, §12.

<sup>42</sup>See 40A Work Group, *supra* note 13, App. at 12.

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Now, Jennifer, if you would like to talk about some of the problems that you had operating under this rule, I think that might be a little more interesting.

JENNIFER EVANS WILLIAMS: Thank you all for being here. My name is Jennifer Evans Williams. I'm a certified child welfare law specialist here in Tennessee. I practice mainly in the upper middle counties of Tennessee: Davidson, Cheatham, Montgomery, and Robertson. I started as a DCS<sup>43</sup> attorney under Ms. Mary Walker, who is one of our panelists later, and in the last eight years I've been in private practice primarily doing guardian ad litem work. One of the first things they asked me in law school was, "What do you want to do?" and I wanted to protect abused and neglected children. That's what I've done with my career, and that's what I intend to continue to do: represent children. I do adoptions, I do some post-divorce custody work and child support, but mainly I do guardian ad litem work. So when the provisional rule first came out, I got a little hot under the collar about the changes that were drastically different in the practice as a guardian ad litem versus Rule 40A.

What I see in listening to the presentation here about Rule 40A's history and how we got here is that the mistakes of a few have almost ruined the work of many. That was my opinion when I first got 40A. I was very upset. I was so upset that I made two comments. The first one was, "Please don't do this. Guardians ad litem who practice in juvenile court need the same standards that we have when we're going to practice in divorce court, so please don't do this." I wrote a brief, one page letter. Then, when I got the provisional rule with all the changes, I wrote a long letter that was very passionate and professional about how I felt that I could not protect children under Rule 40A, and that it would keep me from doing my job. In fact,

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<sup>43</sup>Tennessee Department of Children's Services.



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I met with my judges and said, “Don't give me any more of these cases, because I can't protect children if you're going to tie my hands as a lawyer and make me just an advocate and not a lawyer.”

That didn't work. They kept giving me cases, because there were children that were in need of guardians ad litem with experience, who know this kind of law, and know what they're doing. If you're working as a guardian ad litem, it's because you care about children. You don't do this work to make a lot of money. You use other cases to supplement your income, and you do this work because you love children. Should you be compensated? Yes, you should. But making sure that the child's interests are taken care of is the reason why you're here.

I'm going to go through both my concerns with the current provisional rule and some of the things I actually like about it, as well as what I think about the working group's provision, which is not yet law. The provisional rule is still in effect until the Supreme Court considers adopting the working rule, which is a really great idea and is really going to fix a lot of the issues. When I'm done here, we'd like an open discussion from you all.

I'll start with a positive note about the current provisional rule's Section 3, where it indicates that the judges shall appoint guardians ad litem “sparingly.”<sup>44</sup> That sounds a little odd, but the reason why I think that's appropriate is there aren't enough of us who do this work. If every single divorce required a guardian ad litem, there is no way that we could get the work done. Those of us that do this know that it's great work, but not every lawyer acts as a guardian ad litem. So limiting the scope of which cases would take guardians ad litem relieved me, because I'm one of the few guardians in my counties and I can't do them all, and “sparingly” limits it to the cases that are more severe. The judges in my region often say, “Children can survive

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<sup>44</sup>TENN. SUP. CT. R. 40A, §3(b).

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divorce, but they cannot survive the conflicts of divorce.” I think that's one of the biggest reasons why judges appoint guardians ad litem in these cases: when there's extreme conflict, extreme violence, drugs: what they call the really hot button issues. One of the judges tells me that I'm his guardian ad litem in a lot of his cases because I “speak the language.” I used to be a DCS attorney, and I know what risk of harm is and what threats to children are. Judges like people that have had those kinds of experiences and are willing to use that experience to protect children. So that limitation was one of the things I liked about the rule.

One of the other things I liked was in both Sections 4<sup>45</sup> and 8<sup>46</sup> where the rule specified the tasks of a guardian ad litem and the expectations of the court and the litigants for the guardian ad litem. When I'm appointed on a case, a parent will meet with me in my office, and I'll ask, “Do you know why you're here, and do you know why I am appointed on your case?” They say, “No. Why do I have to pay money to the court for you when I've got a lawyer?” I explain to them that I'm not their lawyer, I'm not the other side's lawyer, but that I'm there for their child, and it is my job to make sure that their child is protected. Sections 4 and 8 of the order are really clear in explaining our role to the lawyers and the court, so they know that we can't do everything and what our tasks and our rules are. I like that section.

Section 5 talks about the duration of our appointment, which is fine because it tells us that when the case is over, our role is over.<sup>47</sup> Here is a practical tip from me: I want an order of withdrawal. We all should know that when the litigation is over, we're done. But the parents may not know that, and the children may not understand that. When I'm relieved, that doesn't mean I'm going to stop

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<sup>45</sup>TENN. SUP. CT. R. 40A, §4.

<sup>46</sup>TENN. SUP. CT. R. 40A, §8.

<sup>47</sup>TENN. SUP. CT. R. 40A, §5.

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talking to that child. I tell all the children who I represent that in the event there are questions or problems a year or so down the road and they need to call me, they can call me. I tell them I'm not their lawyer in court and I may not file the actions that need to be filed for them, but I'm here if they have questions or concerns. But I want an order saying that I don't have a legal and ethical responsibility to continue to visit that child and check on that child.

I think Section 11<sup>48</sup> addressing our fees is reasonable. The reason I think it's reasonable is because it's in line with the regulations for what those of us who take guardian ad litem appointments in juvenile court are paid. Is it enough? No, it's not. Are there limits, and are we going to go over our caps? Yes, we are. But the reason why you do this work is because you love children, not for the money. It should be the same in Rule 40A: there need to be limits and set parameters so that cases like those in Shelby County don't mess this up for the rest of us.

The things that I like about Rule 40A are brief, because I have more concerns with the provisional rule. One of the problems that I had with the provisional rule is Section 1, which Lucie has addressed, and how it originally applied to non-lawyers.<sup>49</sup> This provisional rule applied to you CASA advocates too, and you're not lawyers. You've had a lot of experience and probably know the things a lawyer is supposed to do, but this rule applied to you too. This rule made a big open door for just about anybody that the court or lawyers felt would be appropriate to be appointed as a child advocate, and I was concerned that it applied to more than just lawyers.

Under Section 8, the provisional rules originally said a guardian ad litem is not a party to the suit.<sup>50</sup> How are we not a party to the suit if we are the advocate for the

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<sup>48</sup>TENN. SUP. CT. R. 40A, §11.

<sup>49</sup>TENN. SUP. CT. R. 40A, §1.

<sup>50</sup>TENN. SUP. CT. R. 40A, §8(b).

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child? It makes no sense to me. Everyone knows that when there's the sequestration of witnesses, if you're not a party, you're out in the hallway. So you, the guardian, are going to sit there all day while witnesses are being called to testify about what's going on in the child's life that you are there to protect, and you can't hear what's going on. Could you have interviewed that person? Yes, and you should have, if you knew about that person. But how many of us know when you interview a person, what they tell you then is the exact same thing they're going to say when they get to court under oath? I think a lot of us know that that doesn't happen. So that concerned me, even though it hasn't happened to me yet, honestly. I've been called as a witness under this provisional rule, and I have not been sequestered by the rules. My judges have determined I wasn't going to be under the rule of sequestration. Even though I may not be considered a party under the provisional rule, they wanted me in the courtroom and wanted me hearing what's going on with my child. Thankfully, the judges allowed me stay in, because it's been eye opening to see some of the witnesses in court.

I think the biggest problem under the provisional rule is Section 9,<sup>51</sup> and the working rule really resolved my concerns.<sup>52</sup> I don't see how as a guardian ad litem you can be an advocate for your child if you are not allowed to act as a lawyer. We all went to law school, or are going to law school, for our law degrees, and we should be allowed to use them. Why are we going to be appointed for children if we're not going to be able to use that law license to protect them? If you are not allowed to act as a lawyer, you're not allowed to file motions, you're not allowed to file pleadings, you're not allowed to call witnesses, and you're not allowed to introduce exhibits. There is no way that you can protect the child that you're appointed to represent if

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<sup>51</sup>TENN. SUP. CT. R. 40A, §9.

<sup>52</sup>See 40A Work Group, *supra* note 13, App. at 7-9.

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you're not able to act as a lawyer as your law license allows you.

I have several children that I represent. When I first got the cases, I sent a letter of appointment to the lawyers explaining my role, asking for permission to meet with their client, and requesting information about what's going on in the case. I included a restraining order that says "we are restrained and enjoined from speaking to the child about the litigation, about custody, about visitation, and about the guardian ad litem's role." Let's keep the child out of the middle of this, because as I stated earlier, the adjustment of divorce is hard on children, but it's the conflict that's the main issue. So I wanted a restraining order that said everyone was going to use common sense and keep the child out of the middle of this high conflict situation. Nine times out of ten, they would all sign it. If Mom is going to sign it, Dad's going to sign it, or if Dad's going to sign it, Mom's going to sign it, because they both want to look good to the judge and this guardian ad litem by saying they're putting their child's interest first. There are quite a few cases I had that the parents actually wanted that, but sometimes you have these cases where they just want to get the leg up on each other. So I would have those restraining orders signed. Then if I ever went to visit the child and the child told me about how badly Mom is bashing Daddy, or Dad is bashing Mom, or Stepmom is saying this, I would do a motion for contempt or a show cause order to say, "Judge, they're putting this child in the middle, and preventing this is exactly the reason why you appointed me."

Well, under the provisional rule, I can't do that. I can't file pleadings. I can't file motions. I can't do show cause orders. I can't protect my client from the actions of these parents. It reduces me to sending a strongly-worded letter to their lawyers asking them to please make them stop. But for parties that are already acting unreasonably, what good is a letter going to do? When parties are not

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listening already and are already not doing what they're supposed to, my letters are going to be in vain. Is it going to document that I'm doing my job? Sure. But is that protecting my child? No. All that will happen is the parent will get that letter from their lawyer and then go to the child and say, "Why are you telling this guardian ad litem what I said? You need to keep your mouth shut." That's going to make it harder on that child. That part of the provisional rule prevented me from protecting children, so that was one of my main issues.

Another issue that affects practitioners who represent litigants as well is 9(c) of the old rule.<sup>53</sup> It said a guardian ad litem may communicate with a party who is represented by an attorney unless the party's attorney has notified the guardian ad litem in writing that such communication should not occur outside the attorney's presence. What have we learned in law school 101? If a party is represented, you don't speak to them without the permission of their lawyer. To me, it is a direct violation of ethical considerations to go talk to that mom and that dad without telling the lawyer who represents them. As a litigant's attorney, that's very concerning. If I was representing someone, I wouldn't want a guardian ad litem talking to my client. A lot of us know that clients sometimes are their own worst witnesses, and they need to be protected from themselves from saying things that are not appropriate. They may have the best of intentions, but it comes out wrong and hurts their case. That was a big concern for litigants. As a practical matter, I still get permission from the litigant's attorney to go speak with the client or offer to have them present while I speak with and interview the client. To me, that's just what is ethical: you don't talk to another person's client without permission.

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<sup>53</sup>TENN. SUP. CT. R. 40A, §9(c).

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The biggest problem with the provisional rule is the (f) subsection about calling us as a witness.<sup>54</sup> Major problem. How can we protect our children if we are the witness and not the lawyer? In fact, it hurts really the litigants, because I've been called already four times over the last year as a witness in cases that I represent, and what the judges are saying is: "You enter at your own risk, because I'm going to let her say whatever she wants to when she gets on this stand." So I get to talk like an expert: get in hearsay, give my opinion, and say whatever I want to say, and then I'm cross-examined. It's been a bit odd. For those of you who have not been called as a witness, it's a lot more fun to be at the podium than it is to be in the witness seat.

LUCIE BRACKIN: I agree.

JENNIFER EVANS WILLIAMS: I don't really care for the witness seat, but at the same time, I do what I need to do to take care of the children. It's worked out just fine, but I'm just not able to call the witnesses that I need to call, because I'm just saying what someone else has told me. When I first met with the judge to tell him I didn't want to take these cases under the provisional rule, I asked him, "How is it going to work if I'm a witness? I don't have any firsthand knowledge. I'm not living in these people's home. I'm interviewing kids, interviewing witnesses, and talking to school professionals." He said, "I'm going to treat you like an expert, and let you testify about anything that you relied upon to make your opinion." I don't know how many litigants' attorneys are going to like that continuing, because it really hurts their cases as much as it hurts ours.

Those were my main concerns with regards to the provisional rule. One of the things that I think is good in the working group's provision is that it is lawyers only

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<sup>54</sup>TENN. SUP. CT. R. 40A, §9(f).

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under Section 1.<sup>55</sup> If you're a guardian ad litem in a dependency and neglect case in juvenile court, and there's some kind of action that goes to circuit court, juvenile court by authority transfers that under 37-1-103,<sup>56</sup> and you can be the guardian ad litem in whatever new action is going on. That consistency is important for a child, because the child doesn't understand who guardians ad litem are and why you're here now but not here later.

Lucie went over access to children under Section 7<sup>57</sup> well, but I just wanted to briefly mention that it's very important. You would be surprised if you haven't done this work how difficult it is to get access to the child that you represent, and I've had to put in orders to see the child. The schools are protective, as they should be, but when I get there they say they'll have to call the parent and get permission. That really defeats the purpose of me coming to the school to talk to the child alone, because I want to make sure the parent is not telling the child what to say to me. So the addition by the work group of "without the presence of any other person"<sup>58</sup> is extremely important. Now, if it is passed where we are lawyers and are not called as witnesses, I like to get a social worker or guidance counselor in there with me, so that they can be my witness. Then, I call them to the stand and ask what the child said when we met, instead of me having to give that information. It's very important to have the second part of the provisional rule there that talks about our discovery. It's hard sometimes for schools to release records without permission from the parents, and I'm glad they're overprotective, but a lot of times if they've not worked with guardians ad litem before, schools don't realize what your authority is and what your role is.

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<sup>55</sup>See 40A Work Group, *supra* note 13, App. at 1.

<sup>56</sup>TENN. CODE ANN. §37-1-103 (2011).

<sup>57</sup>TENN. SUP. CT. R. 40A, §7.

<sup>58</sup>40A Work Group, *supra* note 13, App. at 5.



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LUCIE BRACKIN: One thing that we did as part of the committee was put together a Rule 40A discovery order that I think would help in addressing that as well, Jennifer. It's very short: fabulously, a bunch of lawyers and judges were able to put together an order that's a paragraph long. It just says, "For the purpose of preparing for the adjudication and disposition of matters pending before the court, the children's guardian ad litem, \_\_\_\_\_, shall have access to all documents and records pertaining to the children, including but not limited to all records of the Department of Children's Services and any other medical, educational and/or psychological records. The guardian ad litem is further authorized to interview any individuals having contact with or providing services to the child, work products of the Office of the District Attorney and counsel for the Tennessee Department of Children's Services, the open criminal investigative files of the police department, and the identity of persons making reports/complaints to the Tennessee Department of Children's Services are excluded from this order for discovery." Then we have a way to modify it and tailor it to your situation. That order was something that we were going to suggest for people to use to have that access to the information that needs to be in an order.

JENNIFER EVANS WILLIAMS: I think it's essential. In juvenile court, we've got rules to give us discovery, and we're allowed to get the records. We should have the same liberties and abilities in chancery and circuit courts when we're doing this litigation, because we've got to have access to these records to be able to fully advocate for the children. My strongest reason for praying and praying that the Supreme Court will adopt the working group's rule is that it makes us lawyers again. I think Rule 40A's first provisional rule took that away from us. And how it is that we can protect children if we're not lawyers, I have no idea.

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That's what we need to do if we're going to represent children. CASA is an awesome organization. I've been on the board of directors and I'm the current trainer in Robertson County, and they do a great job as non-lawyers.

That's one thing I commented: if you're going to keep this rule as is, then apply it to them. Take the funding that you're going to pay guardians ad litem and put it in their not-for-profit organization so they can recruit more volunteers to be advocates and witnesses for children. But if you're going to regulate guardians ad litem in post-divorce litigation, let us do our jobs and let us be lawyers.

So that's what my practical experience has been on the front line, working under the provisional rule in cases where that's made it difficult or impossible for me to protect children. Now we'll just open this up to questions.

ROBERT ROGERS: My name is Robert Rogers. I practice here in Knoxville. I mostly practice in juvenile court here in Knox County. It appears there's been a lot of labor and effort put in to crafting Rule 40A and working on these provisions, but all the while there was Rule 40 that appears to work very well every day in juvenile courts across Tennessee, and it does a very good job of outlining the duties and responsibilities of GALs. I'm wondering, why all this effort to create this hybrid of a social worker and an attorney in Rule 40A, and why didn't they just expand the scope of Rule 40 to include these cases?

JENNIFER EVANS WILLIAMS: I've had the same thoughts, so I'll have to let one of you ladies see if you can help with that.

ELIZABETH (LIBBY) SYKES: My memory is a lot of the discussion centered on the difference of the child in the Rule 40A. In Rule 40, you have an allegation of dependency and neglect, and in a lot of those instances you do have a guardian appointed for that child. The difference

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between that and the divorce case is that you just don't have that allegation of abuse and neglect in a divorce case.

LUCIE BRACKIN: Also, I'll give the non-politically-correct answer: the legislature was about to do something and the court did not want the legislature coming up with their own rule, because Lord knows what ruckus would have resulted from that. Basically, it's because the court wanted to preempt the legislature in doing anything.

ELIZABETH (LIBBY) SYKES: That's true. I think that what the General Assembly was going to do might be a couple lines prohibiting the appointment of the guardians in cases where there are not the allegations of abuse and neglect. The court wanted to be the one to go through that rule-making process, because once you put something in statute, you can only change it once a year. A Supreme Court rule can be changed more often.

DANIELLE GREER: Hi. My name is Danielle Greer, and I'm a 3L here at the University of Tennessee and a member of the *Journal*. I'd like to know how deposing a GAL would work, and in what situations that would occur? I would think that would be very problematic.

JENNIFER EVANS WILLIAMS: I believe it would too, but the current provisional rule allows for that. If you're going to be called as a witness, you're going to be almost treated like an expert by some judges, and they're going to depose you like they're going to depose everyone else for discovery. In some cases I've had some colleagues who have been served interrogatories to answer. To protect the confidentiality of my client but still comply with rules of discovery and the court order creates a lot more problems. I think the current provisional rule opens you up to discovery requests such as that, and I think that's going to make it more time-consuming and run up fees even more. Now, if

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the working group rule is passed, I don't think that it would allow that. I think it will treat us much more like guardians ad litem in juvenile cases, as we should be.

LUCIE BRACKIN: Have you been deposed, Jennifer?

JENNIFER EVANS WILLIAMS: No, not yet.

LUCIE BRACKIN: I haven't either.

JENNIFER EVANS WILLIAMS: I've been called as a witness and I've had a colleague get served interrogatories, but I haven't been deposed. They usually will call me and depose me over the phone but not a formal deposition.

COLLEEN STEELE: Hello. Colleen Steele of the Knoxville Bar and also a GAL, and I am in adversarial post divorce, so I'm in both sets of courts. Has there been any anecdotal evidence of how each individual court system is responding to the provisional Rule 40A? I've not found any consistency even from one judge to another. So invoking the rule at this point is kind of like saying, "Well, hello, come down my little rabbit hole," because they don't believe in it.

JENNIFER EVANS WILLIAMS: Right. I've had some judges tell me "I'm going to run the courtroom the way I feel that it needs to be run, and I'm going to do what I feel like I need to do until an appeals court tells me that I can't do things this way." I think we know a lot of judges that have handled it that way. The judges that I've practiced in front of have tried to stick by the provisional rule in saying that the parties can call me as a witness, but they've also said they can leave me in the courtroom to act as a lawyer for the client, leaving it to the litigants to agree as to what the role of guardian ad litem is in some of those cases I've done. Obviously, you should be following the provisional

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rule, because that's what the rule is, but until someone appeals it, that decision is going to be final. But I've not seen consistency. I don't know if you have, Lucie, as far as how judges handle them.

LUCIE BRACKIN: I can think of only one case in Shelby County where a guardian has been appointed since this provisional rule went into effect, but I'm sure there are more out there. I am the chair of the family law section, and I like to know what's going on in the courtroom. Judge Robert Childers, one of our circuit court judges, commented that if the Supreme Court's intent in adopting Rule 40A was to keep judges from appointing guardians ad litem to assist courts in making the difficult decisions involving the best interest of minor children, then the court has succeeded. He's written a more detailed letter to the chair of our committee and said that he stopped appointing guardians ad litem. So in Shelby County, we're just not appointing guardians ad litem.

ELIZABETH (LIBBY) SYKES: I'd like to add though that after this hearing we did a search across the state, and what we noticed is that you had pockets where guardians were appointed regularly in divorce or post-divorce situations, and then you had cases like Davidson County, where they never appointed a guardian ad litem. So, even in Shelby County where that it was a little bit more common, it was really on a small percentage of the more high-conflict cases. The practices across the state were very different. So, Lucie, you say that guardians ad litem haven't been appointed in Shelby County since then. What has been the impact on the children?

LUCIE BRACKIN: From what I've seen, I think it's leading to longer, more protracted trials. The guardians ad litem in my experience were extremely helpful in letting attorneys know the problems in the case on each side, and

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saying, “You guys need to knock heads together and make these people settle this case, because this is going to come out about your client and this is going to come out about your client.” So it was also an extremely effective settlement tool. Guardians ad litem are being appointed in Shelby County, but I just don't know of people that have been used, other than my friend who is not going to be called because neither side wants to call the guardian ad litem. That's the only story really that I've heard in the last year about that.

JENNIFER EVANS WILLIAMS: I have the same thing in Montgomery County and in Robertson County, the district that I'm mainly appointed in as a guardian ad litem. They're continuing to appoint me even though I (inaudible) after Rule 40,<sup>59</sup> they're continuing to do that, because it is a very effective settlement tool. They tell the litigants when they appoint me as guardian ad litem, “You better listen to what this guardian ad litem has to say because I know you got one side but I know she's got the child's side and I'm going to listen really strongly to what she has to say.” Now, 50 percent of the time judges do what I recommend, and 50 percent of the time they don't, because sometimes I'm an overprotective mother bear to the kids that I represent and the judges want to be a little bit fairer to the parties. But the parties take what guardians ad litem say seriously at the appointment. So when I get through doing my investigation, I usually do a letter and/or a phone call to the lawyers and say, “This is what I think you need to do, this is what I think is best for the children,” and they usually convince their clients to do that in a lot of cases and settle. And that is the reason why the chancery and circuit court judges there continue to appoint me, because it takes a lot of trial time off their docket and reduces litigation because I'm going to be influential to the judge at the time he makes

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<sup>59</sup> TENN. SUP. CT. R. 40.

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a decision. Though, like I said, some of the time he does what I ask, and some of the time he doesn't, depending on what's needed to be done.

Another issue that I would file when I was appointed guardian ad litem was a motion for random drug screens. There are a lot of cases you get those allegations. How are they going to get done? You file a motion. Well, a provisional rule doesn't let me file motions. So I write a letter saying, "Please do drug screens." How effective is that? Well, someone is not going to say, "Oh, sure, I'll do one. I smoked pot last week, but sure, guardian ad litem, because you asked me to." So I can't file those kinds of things under the provisional rule. Under the working group rule, I'll be able to do that to protect children when I feel like it's necessary.

AMY WILLIAMS: My name is Amy Williams. I'm a 1L here, but I worked with the CASA program for several years before I came to law school. And I was just wondering, with the guardians ad litem, GALs, in juvenile court there's a fund for that and the families aren't paying for it. Have you encountered cases where there are parties who are going through a divorce where there needs to be a GAL appointed to that child but the parties can't afford to pay for it? Is there any kind of provision for that in the works?

JENNIFER EVANS WILLIAMS: No. What the judges say is, "If you can afford to hire a lawyer to fight this divorce, you can afford to pay for the child's lawyer, and you're going to do it," and that's what they do. And typically my judges will make each party put \$750 down, which is a \$1,500 retainer, and they ask when I get close to running out of that if I would notify the court for additional funds. But if you manage the case right and do what you're supposed to do in a relatively quick time frame, you can usually get it done close to that or slightly more. It depends

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on how litigious the parties are going to be and the extent of the litigation, if it's going to continue to escalate some of those fees. Sometimes I've had cases where there's a pro se litigant and you've got one person that's filed for divorce and the other side can't. The judge can make that pro se litigant pay the entire guardian ad litem fee up front, and at the end of trial the judge can possibly give a judgment against the other pro se litigant for reimbursement, kind of like a marital debt asset or something of that nature, and they'll allocate that. Sometimes at the end of the divorce a judge will split 50/50 on the GAL fee, sometimes a judge will say 100 percent on one side, 75/25; whatever the judge feels is appropriate.

One of the things I like that my judges are doing in my county is giving a joint and several liability judgment against both parties, so, that way, if I've got one party who's got money and the other one does not, at least I can hopefully get paid most, or a portion of, the fee that I've expended and let them go after the other party later. Often I incur more debt than I do collection on those fees, but like I said at the beginning, it's not the money that you do this work for; it just has to help supplement your income.

JACKIE KITTRELL: My name is Jackie Kittrell and I'm wondering about the statement of the guardian ad litem as a settlement tool. How do the guardians in 40A<sup>60</sup> cases work in mediation? Do they attend mediation? Is mediation even in play at that time?

JENNIFER EVANS WILLIAMS: Mediation is required before there can be a contested litigation. And I attend mediation if the lawyers attend mediation. I take that rule. Because everybody knows when lawyers are at mediation, it kind of hypes everybody up and they're all bullied up, and if we're not bullied up, then parties might be more open

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<sup>60</sup> TENN. SUP. CT. R. 40A.



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to resolve disputes. So I attend it if the lawyers attend it. If the lawyers don't attend it, I don't. I demand that the lawyers consult with my schedule so that I can be there if they're going to be there, because often I'm going room to room helping the mediator settle the case, and I've settled some cases that way. Have either of you had experience with that?

LUCIE BRACKIN: I've not actually attended a mediation. I make sure to do a report before mediation so that the lawyers can have it at mediation, and that's a very effective way to do it. But in mediations, you're sitting there all day, maybe a half a day, and there's a lot of down time. So, to me, it doesn't make a lot of sense to be there at the mediation. I've been on call when I've known that a case was mediating, and I will inform the lawyers to call my cell phone, and that I'll interrupt whatever I'm doing. I'll talk, or I'll come down there if they want me to. But, I think just sitting there with them is maybe not the best use of time. But I do know GALs who have sat there through a mediation, like in an extremely contested case where their presence would be helpful. So it just depends.

JENNIFER EVANS WILLIAMS: I've done both. Sometimes I've gone; sometimes I haven't, because I've been on call. Sometimes I've sent a letter ahead of time saying, "This is what I think is going on in this case." Like Lucie said, it depends on the kind of case.

LINDA SHOWN: I'm Linda Shown. I practice in Blount County in juvenile, chancery, and circuit court. I believe that we really are on the right track here by revising this rule because the other rule just gutted the effective representation for the child. But I think we should also consider a name change because we're really not guardians ad litem, we're more to the effect of attorneys ad litem, and I think that that would make it clearer and reduce the

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confusion of what our role is. How can it be possibly be that we would be sent out into the other room or the witness room when we're supposed to be there acting as an attorney? So it seems to me that we should rename ourselves.

JENNIFER EVANS WILLIAMS: I agree to a point. What I have found goes to the part where the working group actually has addressed what you've just said, where they pretty much bifurcated the role of the guardian ad litem. It's under Section 8(c).<sup>61</sup> Because the way I take those terms, and this may be old school from what I learned, an attorney ad litem can be appointed in juvenile court as well as in a dependency and neglect proceeding strictly for the preference of the child. It doesn't matter what you want, it's strictly what the child wants that you've got to push for, whereas a guardian ad litem in juvenile court uses best interest strictly. And often as guardian ad litem you can do both, unless it becomes so divergent that you can't do both and you have to ask for an attorney ad litem under Rule 40<sup>62</sup> to be appointed for that child in juvenile court. So the only thing that concerns me about the term is that's what we're doing, because we are attorneys for the children, but we're called the guardian ad litem, although we should be doing both. Under the provisional rule as under this working group rule, we're going to be the guardian ad litem and the attorney ad litem because we've got to put on two hats.<sup>63</sup> We've got to make sure that the best interest of the child is fully advocated for, but at the same time we've got to make sure that that child's preferences are expressly given to the court. I feel most of the time I can do that by making sure the right witnesses are called and making sure the court knows the child's preference when it's an age

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<sup>61</sup> TENN. SUP. CT. R. 40A, §8(c).

<sup>62</sup> TENN. SUP. CT. R. 40.

<sup>63</sup> TENN. SUP. CT. R. 40A, §9, cmt. (2).

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appropriate circumstance. I also advocate for best interest as well. This doesn't contemplate getting an attorney ad litem to come in only for a child's preference, and I don't know if other extreme situations will allow that or not. But I can see your point.

DANIELLE GREER: As you can see, I'm very interested in this topic. It's Danielle Greer once again. And I know one of the main criticisms of the prior rule and using it in divorce cases was that the GAL was a lot of times acting as the judge and judges saw that as a problem. I don't necessarily agree. I see the argument. I could make the argument if I was on that side of the opinion. How do you think the changes that your group has proposed alleviate that concern? I'll ask the rest of you whether you think that that is a real concern or not. Because my opinion is that it's truth-seeking, and that may be the common thread, but it's something that we need in these cases. It's the only reason why GALs are necessary in these types of cases anyway, and to eradicate that thread of it would be to render you pointless.

LUCIE BRACKIN: Well, in the proposed rule we say specifically that the guardian ad litem cannot have a judicial or quasi-judicial role and cannot be a special master,<sup>64</sup> so that specifies that a guardian cannot make decisions over the situation at hand. But, you know you are being a truth seeker, because oftentimes you have a guardian appointed because one party's saying this and another party's saying that and the attorneys are saying, "We don't know who's telling the truth so let's get a guardian to investigate and tell us what is the truth here." The next step is that if you have a truth-seeker, there's got to be a fact-finder. So the guardian is sort of a fact-finder, which is the judicial role, and that's a difficult problem to

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<sup>64</sup> TENN. SUP. CT. R. 40A, §6(b).

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have. But you've got to have someone impartial to step in and say, "I've talked to this neighbor, I've talked to this teacher, I've talked to this doctor, and this is really what's going on here." And usually it's sort of a blend of what both parents are saying that I've seen and that I've found. So, I hope that helps.

JENNIFER EVANS WILLIAMS: Did the original case<sup>65</sup> deal with the judge just rubber stamping some of the guardian ad litem's recommendations?

LUCIE BRACKIN: That was a big complaint. The issue was that the judge would say, "Oh, we have a guardian ad litem report," and the parties perceived that they were just rubber stamping it and saying, "We're going to go with this."

ELIZABETH (LIBBY) SYKES: That was the perception.

JENNIFER EVANS WILLIAMS: Okay.

ELIZABETH (LIBBY) SYKES: I don't know that that was reality.

LUCIE BRACKIN: It was the perception.

ELIZABETH (LIBBY) SYKES: But that was the perception.

LUCIE BRACKIN: The attorney still had the opportunity to put on their case. They could still call their witnesses, but we do have some judges in Shelby County who won't let you put on your case, so there was a complaint made for a reason.

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<sup>65</sup> *Andrews*, 2010 WL 3398826.

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JENNIFER EVANS WILLIAMS: In my jurisdictions I've heard that that's the perception, but actually, with my judges, like I said earlier, fifty percent of the time they do what I recommend, or a quasi-part of what I recommend, and fifty percent of the time they don't, which really shows the impartiality of the guardian ad litem. I'm not the magistrate; I'm not the one making the decision. I'm just there as an advocate for the child and my opinion of what's best and the judge's opinion sometimes coincide and sometimes they do not. I listen to the judges and think, "Wow! That makes sense. Why didn't I think of that before I told you what I was going to say?"

RENEE DELAPP: Thanks. My name is Renee DeLapp and I work as a therapist here in town and I also have a law degree, so I come at it from a couple of directions. And I just want to comment that one of the things that I've really appreciated about the guardians ad litem that have been involved with children I've been involved with – I used to work as a school-based therapist – has been the problem-solving that's possible before all the damage is done, because these cases can go on for years, as we all know. And what I've really noticed too is as we defund DCS and some of the other social agencies that could have had a role, the gap is getting huge. So the presence of somebody who actually is the child's advocate, who can fill in for a therapist like me, where my ability and my professional role, my ethics, have to stop, there needs to be that next step that can happen. So I really appreciate what you do.

ELIZABETH (LIBBY) SYKES: Our office administers the indigent defense fund and the guardian ad litem fund. So if you have attorneys here in the office who haven't been paid, it's probably my fault.

JENNIFER EVANS WILLIAMS: You better exit fast right now.

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ELIZABETH (LIBBY) SYKES: But, anyway, I would encourage you by saying that in the next couple of months we're introducing a system we're calling ICE, it's Indigent Claims Entry, it's an electronic interface for the submission of these claims. And so this is my plug for that. Guardians ad litem are being paid within three to four days as opposed to twelve weeks.

LUCIE BRACKIN: Yeah.

ELIZABETH (LIBBY) SYKES: So anybody who is still continuing to send in paper, I've really decided they must not want to be paid at this point.

JENNIFER EVANS WILLIAMS: We have the ICE system in Robertson and Davidson counties now and it's wonderful.

ELIZABETH (LIBBY) SYKES: It's wonderful.

JENNIFER EVANS WILLIAMS: It's computerized. You've got to put it all in the system, but that payment comes by automatic draft. It's working really well.

ELIZABETH (LIBBY) SYKES: It may be the greatest thing we've ever done.

JENNIFER EVANS WILLIAMS: Really.

ELIZABETH (LIBBY) SYKES: But I would like to add that when our office took over the guardian ad litem fund for dependency and neglect, and we took it from the Department of Children's Services in mid-2000 or so, we were given \$800,000. This year, we'll spend six million dollars from that fund. Last year we spent a total of thirty-six million dollars statewide for our guardian ad litem and

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indigent defense funds. And almost ten million dollars of that money is used for what I now call child welfare cases as opposed to the attorney that is representing a person in a criminal case. I think a lot of those things are more of a social work-type role than the role of an attorney, but what I'm often told is that because of the cuts in the staff at Department of Children's Services, there's not people actually there to do it, so that guardian ad litem in those dependency and neglect cases actually does have to take on that role that you would otherwise think the Department of Children's Services would do. But that's not a criticism with the Department, we've taken our own cuts, but it's a reality that it's moved our fund from \$800,000 to \$6,000,000.

JACKIE KITTRELL: I had one more question for Lucie Brackin that participated in the work group.

LUCIE BRACKIN: Yes.

JACKIE KITTRELL: Could you talk more about the reasoning behind Section 12 that prohibits GALs from initiating appeals?<sup>66</sup>

LUCIE BRACKIN: Yes.

JACKIE KITTRELL: I have a problem with that because I figure if I'm going to be the child's attorney that means I need to be able to access every legal avenue that's available to me, and that might be filing an appeal if necessary. It seems like that would unnecessarily handicap the child's attorney, the GAL. I don't know if there's been a rash of GAL-initiated appeals in the state.

LUCIE BRACKIN: Well, the reality of it is that of course there's not, because who's going to pay for that? The

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<sup>66</sup> TENN. SUP. CT. R. 40A, §12.

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rationale for that is that if either parent does not make the choice to appeal the decision, then the working group didn't want to give the authority to the guardian ad litem, because the parents' rights are paramount in their divorce. We just didn't want to give the guardian that power.

JACKIE KITTRELL: Isn't that a bit difficult to square with advocating for the best interest of the child? I mean, you can have cases where the parents are possibly colluding one or more issues and the trial court goes along with it. I mean, does it -

LUCIE BRACKIN: Well, in such a hotly-contested divorce situation or post-decree modification, those parents really aren't colluding about much of anything because they can't say that the sun sets or the sun rises.

JACKIE KITTRELL: Right.

LUCIE BRACKIN: And so that's not a real possibility. And we did have a lot of discussion at the end of our committee meetings about this and just decided that if we included the authority of a GAL to appeal we would obligate the parents to pay for the guardian to appeal the decision and we just couldn't put that burden on them.

ELIZABETH MCDONALD: Could I follow up on that?

LUCIE BRACKIN: Sure.

ELIZABETH MCDONALD: I don't know that I need that but you know, if you're the guardian ad litem and you would be interested in appealing, a lot of times that's because the parent who may not have much money is the one appealing, and the one who had the money and the hotshot lawyer won – and from a guardian ad litem's perspective that was not the right decision. The wealthier



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party was able to put more of their case on because they had more money for the experts and the discovery and the private investigators, but little mom or dad who didn't have that much money was the best place for the child, although they didn't have the money to really litigate with as much intensity as the other side. I mean, that's been my experience. The one with the money is the one who's going to win, unless the other one is just so grossly off the chart. So it sort of seems to me that – I agree with what you're saying – you give the guardian ad litem for the party with less resources just enough to make a little sting but not enough to do enough to help the child.

LUCIE BRACKIN: I think you have definitely hit on a concern in this proposed rule.

JENNIFER EVANS WILLIAMS: I've run into that as guardian ad litem on occasion. And to file an appeal is not that expensive with a cost bond. Even the parent that doesn't have that much, all they've got to do is file the appeal and you, as guardian ad litem, are still appointed, and so you then go in and advocate on that appeal for what position you're going to advocate. Whether or not you're going to get paid is a different matter, but you're obviously going to do what you need to do for the child in doing that. I've also had people say they wanted to call me when I wasn't even on the case to be a guardian ad litem for a child. Well, you can't hire a guardian ad litem, that's court-appointed. Now, you can go hire an attorney ad litem for that child's preference if there are some issues that are going on where that could be done.

ELIZABETH MCDONALD: In a divorce proceeding?

JENNIFER EVANS WILLIAMS: You can try to hire an attorney for the child. Whether or not you're going to have standing or not, I don't know.

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ELIZABETH MCDONALD: In a parentage action I was involved in the other side didn't like my position as the guardian ad litem, so they wanted to demand an attorney ad litem. The judge said there was no provision for that.

JENNIFER EVANS WILLIAMS: There's not. All I know is it would be a case of first impression, if someone were to file it.

JAMES CARNEY: I'm James Carney. I'm a family mediator. I'd like to follow up on the discussion around Judy Kittrell's question. I do a lot of cases that involve high conflict and about one-third of those have guardians appointed, and I find often that the guardian serves a very valid role in the mediation because they can offer resources or help resolve some of the allegations that often fly about, about a parent being terrible, and they can help work through solutions to improve the trust, and resolve those questions and get down to the needs of the child, and that often is what is the key to getting the resolution.

JENNIFER EVANS WILLIAMS: Thank you. That helps. And I think for everybody that does guardian ad litem work, it helps to know from a mediator's standpoint that we're not stepping on your toes. Because I'm a talker, as you can tell, and sometimes when I go to mediation I really get to talking and I'm thinking, "Well, maybe I'm stepping on the mediator's toes," and I pull them aside and say, "Do you need me to shut up?," and they say, "No, you're giving me the information, it's being helpful."

ALAN BALLEW: I'm Alan Ballew. I've been a guardian ad litem in the juvenile court here in Knoxville since 2000. That's all I do. I believe that there is a fundamental right that's being ignored. Someone just a minute ago said that the parental rights are superior, or fundamental, or more

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important, as an underlying right in a case. When you have parents that are fighting in litigation, one cannot assume that the children involved are not being abused or neglected. Anytime the parents are fighting like that, the children know that they are in the middle. There is no constitutional right for children. Everybody pays lip service to protecting children, but they have no constitutional rights, it's always parental rights. And until we address that, we'll be doing this sort of thing forever.

JENNIFER EVANS WILLIAMS: Well spoken. I agree.

RACHEL KIRBY: I think it was Section 7, access to the child and information relating to the child,<sup>67</sup> and this may already be decided, but if there is a tape at the CAC<sup>68</sup> of an interview, does that fall under that and give me access to that tape?

JENNIFER EVANS WILLIAMS: It should. And one of you might want to answer this more than me. My experience is what I usually do with DCS. A lot of times DCS is involved in these cases, that's the reason there may not be an action pending but there's been allegations and DCS is investigating and that's the reason why I'm appointed by the court, and I will do an agreed protective order with DCS to get access to their records, which includes the CAC records. Now, under the provisional rule, I can't file pleadings, but under the working group rule I can,<sup>69</sup> and that will give me access to that. But recently there's – and I haven't had a chance to read all the way through it on my e-mail – an Attorney General's opinion<sup>70</sup>

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<sup>67</sup> TENN. SUP. CT. R. 40A, §7.

<sup>68</sup> Child Abuse Center.

<sup>69</sup> TENN. SUP. CT. R. 40A, §9.

<sup>70</sup> Confidentiality of Records and Testimony Regarding Child Sexual Abuse Investigations, Tenn. Att'y Gen. Op. No. 11-21 (March 11,

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about access to CAC records that actually just came out in the last month and I had that sent to my e-mail. So if you'll see me after, I'll get you that. But do you all have any comments about that? It seems like this should be allowed. This should help you get that.

LUCIE BRACKIN: I think it would help you get that. You know, the order that we put forth said that work product would not be discoverable,<sup>71</sup> but an interview with the child I don't think could ever be classified as work product. I think you should be entitled to obtain that. You may have to go to your judge if you have a problem getting it.

JOHN GROGAN: John Grogan, Washington County DCS. If you're appointed GAL, there's a statutory provision that allows you access to those records.<sup>72</sup>

JENNIFER EVANS WILLIAMS: Right. And that's what I usually use. My local DCS attorneys prefer a protective order in the file one that I'm going to use and keep for myself for the purposes of litigation, so that it's not disseminated, because they deal with all kinds of lawyers and they want to make sure that some GAL is not just going to get it and start streaming it to the parents and relatives and all this kind of thing. So, to protect the child, they ask me for a protective order, which I don't have a problem doing because I'd rather be more protective than not. But I agree with you, there's a statutory provision, but not everybody recognizes that as they should.

JOHN GROGAN: Okay. The way I usually do that is with that or a HIPAA<sup>73</sup> protective order perhaps.

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2011), *available at* <http://www.tn.gov/attorneygeneral/op/2011/op11-21.pdf>

<sup>71</sup> 40A Work Group, *supra* note 13, App. at 5.

<sup>72</sup> TENN. CODE ANN. §34-1-107 (2011).

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JENNIFER EVANS WILLIAMS: Yeah. It kind of protects everything. I think it's good practice.

COLLEEN STEELE: In my experience, I've had a lot of GALs that were very helpful in getting medical records, especially for the child or for the opposing party in an adversarial role where I represent one or the other parent. The GAL has been the one who has been able to get the information and most of them have been very cooperative in providing it because this is information that adversarial counsel need to know.

JENNIFER EVANS WILLIAMS: That's the reason why when I get my protective orders, most often what I'll do is include that information in my protective orders, if it's appropriate, and it's going to be for me and the opposing counsel, because I don't want to be in violation of the order and distribute it to opposing counsel if the person who provided it to me expected it would only go to me. But a lot of times I've been using that too.

JOHN EVANS: We've got about five more minutes, so a couple more questions.

LORI SAYLOR: My name is Lori Saylor. I practice in Cumberland County. I was just wondering if there was going to be a discussion of guardian ad litem appointments in child support cases where the district attorney said under *Witt v. Witt*<sup>74</sup> that in a paternity issue you have to have a guardian ad litem, but there's absolutely nobody that wants to pay for you to go to court or do any work whatsoever on that case.

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<sup>73</sup> Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 201 *et seq.* (1996).

<sup>74</sup> *Witt v. Witt*, 929 S.W.2d 360 (Tenn. Ct. App. 1996).

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LUCIE BRACKIN: I don't know of any discussion on that issue that I've ever heard.

JENNIFER EVANS WILLIAMS: I don't either, except that under Section 1<sup>75</sup> it talks about post-divorce and paternity actions. I'm wondering if this Rule 40A is going to apply to paternity actions as well: if it's going to require the litigants to be responsible for those fees, and if they can't pay those fees, if it's going to be up to the judge to determine how they're going to be appointed. In Davidson County, they've appointed me under a 40A appointment in some paternity actions in the child support court because it was a paternity suit about the original parenting plan involving allegations back and forth about what's best for that child, but the judge has to assess the parties with that. Now, they assess it, the parties never put down the original payment, I finish the case and I'm still not paid, and I've got a debt out there to collect. But when you're appointed by the judge, you're going to do the job you're supposed to do. But I haven't been appointed in some of those under this rule.

LUCIE BRACKIN: I don't think this proposed rule, specifically the title "Appointment of Guardians ad Litem in Custody Proceedings,"<sup>76</sup> would apply to a child support matter.

JENNIFER EVANS WILLIAMS: I don't think it applies to child support only, but when it defines custody proceedings, it says paternity,<sup>77</sup> and I kind of think it may apply.

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<sup>75</sup> TENN. SUP. CT. R. 40A, at §1.

<sup>76</sup> *See generally* TENN. SUP. CT. R. 40A.

<sup>77</sup> TENN. SUP. CT. R. 40A, §1(a).

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LUCIE BRACKIN: Well, this custody can be an issue in a paternity case.

JENNIFER EVANS WILLIAMS: Right.

ELIZABETH MCDONALD: I'd like to follow up with that. I'm Elizabeth McDonald from White County. And when you get in these cases where the real issue is DNA, there's really nothing for an attorney – a guardian ad litem – to do. You talk to this person, they're decent, you talk to that person – what is it for us to do in those cases? Yet, when you go and you look at what we're supposed to do, the things that I do really are not going to impact the situation. Both of them have got an attorney, both of them have a child. I don't understand what we're supposed to be doing in those cases.

JENNIFER EVANS WILLIAMS: Those that I've been appointed to use the initial comparative fitness test.<sup>78</sup> When paternity has been established and there's allegations back and forth about how each parent is not fit, and there's allegations similar to a DCS or a post-divorce type of action –

ELIZABETH MCDONALD: But under the statute<sup>79</sup> you have to appoint one and it's just DNA out there, that's all. I don't see the point.

LUCIE BRACKIN: I don't see the point.

JENNIFER BJOUNSTAD: I was on a case like that with *Witt*<sup>80</sup> and it says there ought to be a guardian ad litem and

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<sup>78</sup> See *Parker v. Parker*, 986 S.W.2d 557 (Tenn. 1999); *Nelson v. Nelson*, 66 S.W.3d 896 (Tenn. Ct. App. 2001); *Gaskill v. Gaskill*, 936 S.W.2d 626 (Tenn. Ct. App. 1996).

<sup>79</sup> TENN. CODE ANN. §37-1-149 (2011).

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that was before DNA was as strong a proof as it is now, but it said you had to have a guardian ad litem if there's ever an issue, and so what you do is look at the DNA test and you say, "Yeah, he's the dad."

LUCIE BRACKIN: That's it.

JENNIFER BJOUNSTAD: In that case I tell the attorneys I'm going to meet the child, there's really not a lot for me to do, if there's stuff you want me to do I'm not doing, I'll be happy to do it, but this is what the case law says, this is what the paternity test says.

ELIZABETH MCDONALD: I know.

JENNIFER BJOUNSTAD: But the case law requires that there's a guardian ad litem.

ELIZABETH MCDONALD: Yeah.

LUCIE BRACKIN: Can I just say one last thing before we close? The work group is very optimistic that the Tennessee Supreme Court is going to adopt our rule. We hope very much that the court will. We've actually drafted a suggested order on how to appoint guardians ad litem that I believe will be disseminated. One thing that we wanted to say specifically in the order was to reference Rule 40A and put the website address where anyone can go and find the rule,<sup>81</sup> so that the parties can go and find it and read it. That was one thing that we thought would be important for the litigants to be able to see the rule and read the rule that governs guardians ad litem.

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<sup>80</sup> *Witt*, 929 S.W.2d at 360.

<sup>81</sup> *See generally*, 40A Work Group, *supra* note 13.



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JESSICA VAN DYKE: Thank you so much to this panel. They were all excellent. I think they gave us a lot of great information that we can all use in the future. We have a small token of our appreciation for each of you that Danielle has. At this point, we're going to take a quick break.

DANIELLE GREER: Let's give the panelists a hand before we go.

(A break was taken)

JOHN EVANS: Panel number two will discuss litigation for change. The panelists will each discuss how various jurisdictions have raised awareness about the shortcomings in the child welfare system. We have several scholars that are going to be speaking on this topic this morning. We have Jacqueline Dixon, who is a local counsel, and she served on *Brian A. v. Bredesen*,<sup>82</sup> and she's from Nashville. We have Professor Dean Rivkin, he's a professor of law here that works with the Education Law Practicum. And we have Robert Schwartz, who is the executive director of the Juvenile Law Center in Philadelphia, Pennsylvania. And also Professor Rivkin has several students who will be speaking on this panel as well. I just want to remind the panelists that I know that we've divided up the time so we can hear from you equally and we'll have cards up there demonstrating that. And we certainly look forward to your remarks.

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<sup>82</sup> *Brian A. v. Bredesen*, 149 F. Supp. 2d 941 (M.D. Tenn. 2000).

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### PANEL DISCUSSION 2: LITIGATION FOR CHANGE

*Jacqueline Dixon*  
*Professor Dean Rivkin*  
*Robert Schwartz*

JACQUELINE (JACKIE) DIXON: Thank you. I'm Jackie Dixon. It's really a privilege to be here. I graduated from this school twenty-five years ago and it's really changed a lot in terms of the facilities. It's wonderful. We did not have a room like this. Our big room was over in the part of the building that is no longer a part of the law school I believe. So it's really nice to be here. I enjoyed the first panel. I'm good friends with both Jennifer Evans and Libby Sykes and just really got a lot out of what they had to say. I have a case that's on appeal<sup>1</sup> that's going to address the issue of the distinction between a Rule 40A and a Rule 40 guardian, and so that will probably be out in a year or so. It really gave me a new perspective on the rule to hear them talk.

I feel like I need to state a disclaimer. I am not an expert on child welfare litigation, and I'm not a scholar either. If you knew how I struggled to get through law school, that's funny to hear me introduced as a scholar. But, anyway, I am not an expert on child welfare litigation. I had the good fortune to be in the right place at the right time. My former firm in Nashville was approached by lawyers from Children's Rights when they were investigating prior to filing the *Brian A.* lawsuit,<sup>2</sup> and my partner, my former partner now, David Raybin, and I were asked to be local counsel. And that has been a tremendous experience for me. It's been a privilege to work with those lawyers from Children's Rights in New York City. Marcia

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<sup>1</sup> *In re Jonathan S C-B*, M2010-02356-COA-R3-JV (Tenn. Ct. App. June 28, 2011).

<sup>2</sup> *Id.*

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Robinson Lowry and Ira Lustbader have been the two lead attorneys on the case.

Children's Rights is a public interest law firm. They started as part of the American Civil Liberties Union. They became their own entity in 1995. They protect the lives and legal rights of America's abused and neglected children by advocating for the reform of failing child welfare systems across the country. They have used legal action and policy initiatives to drive lasting reform in child protection, foster care and adoption. They have a website, and I realize you all may have looked at this as just being curious about *Brian A.*,<sup>3</sup> or as part of class work. They have an excellent website, [childrensrights.org](http://childrensrights.org), and they have a complete archive of all of the *Brian A.* filings<sup>4</sup> on that website.

The case of *Brian A.*,<sup>5</sup> as it was known at the time *Brian A. v. Sundquist*, was filed in May of 2000 in the Middle District of Tennessee in federal court. It was assigned to Judge Todd Campbell. Brian A., the lead plaintiff at the time, was a little nine-year-old boy who had been in foster care for four years. At that time he lived in an emergency shelter in Shelby County where he had lived for seven months. He was waiting indefinitely for a home. He didn't have any social work plan or goal to get him out of foster care and into a permanent family. He was without necessary treatment, caseworker services, or appropriate schooling. He was in a grossly overcrowded and inappropriate facility that was meant for extremely short stays of under thirty days, and he had little or no contact with his five siblings. The lawsuit was filed and generated a lot of press. Prior to that there had been a big investigation by the attorneys and other staff people from Children's

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<sup>3</sup> *Id.*

<sup>4</sup> Children's Rights, Tennessee (*Brian A. v. Bredeesen*), Legal Documents, *available at* <http://www.childrensrights.org/reform-campaigns/legal-cases/tennessee-brian-a-v-bredesen/2/>.

<sup>5</sup> *Brian A. v. Bredeesen*, 149 F. Supp. 2d 941 (M.D. Tenn. 2000).

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Rights involving a lot of local Tennesseans that worked in the child welfare system, including local attorneys. The investigation had actually started years before the case was filed. Back in the early- to mid- 90s, close to ten years before the suit was filed, people in Tennessee were voicing concerns about the system, how the system was broken, how it needed to be fixed. Nothing was done for a number of years. At the time because all the State entities that provided services to this population of children were going to be consolidated into one department, the Department of Children's Services, the thought was let's give that a chance to work, let's see if that will make things better, and I believe that consolidation happened in '95 or '96.

Unfortunately, reforms were never put in place, or not put in place to really solve the problems. So in 1999, after Children's Rights began to receive more and more complaints from the advocates on the ground here in Tennessee, they began investigating the concerns, and developed a team of local counsel that was statewide. Wade Davies from a law firm here in Knoxville was one of the local counsel, and he did a lot of work up to the filing of the suit in May of 2000. The main things that were complained about in the lawsuit at that time were children were placed in large orphanage-like settings and other group settings at one of the highest rates in the nation. Children were routinely placed in emergency shelters, like Brian A., our lead plaintiff, and other temporary holding facilities for more than six months at a time without any services, without any appropriate treatment because the State had no other foster care placements for these children. Case workers were overworked and poorly trained with caseloads that prevented them from adequately monitoring and supervising the children in their care. This, unfortunately, in some instances, led to additional abuse and neglect while the children were in custody to remedy home situations where that had happened. Children were bounced around from one inappropriate foster placement to

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another, based not on their specific needs, but just because there was a slot here, there was a slot over there at this group home, so they stuck the child there. That attitude was prevalent.

So the lawsuit was filed. For those of you who enjoy civil procedure, there was a motion to dismiss filed, and that opinion<sup>6</sup> is in the written materials that you were provided today. We undertook voluminous discovery; that was very interesting. There were lots of documents. The State fought discovery. The case was assigned to a magistrate judge, Judge Joe Brown, for discovery disputes. Again, for a little civil procedure issue, most federal court discovery disputes do go to the magistrate judge who's assigned to the case. Magistrate Judge Joe Brown ruled that we could take discovery. The case moved forward. The discovery phase lasted about a year. Then in the summer of 2001 we reached a settlement with the State and a consent decree<sup>7</sup> was entered that provided for a lot of work to be done by the State. A lot of times when you settle a case, for those of you who do litigation, that's the end of it, you're done with the case, the file goes away. You expect that there's going to be just compliance with the settlement, that's it. But in this instance, there was a plan put in place where the folks from Children's Rights would continue to be involved and there would be technical assistance people, experts in child welfare, involved in monitoring and working on remedies to specific problems that existed at that time. The settlement also required the State to commit resources to care for and move children through the system

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<sup>6</sup> Order and Memorandum, Feb. 24, 2010, *available at* [http://www.childrensrights.org/wp-content/uploads/2010/02/2010-02-24\\_tn\\_order\\_and\\_memorandum\\_denying\\_defs\\_motion\\_to\\_dismiss.pdf](http://www.childrensrights.org/wp-content/uploads/2010/02/2010-02-24_tn_order_and_memorandum_denying_defs_motion_to_dismiss.pdf).

<sup>7</sup> Consent Decree, July 27, 2001, *available at* [http://www.childrensrights.org/wp-content/uploads/2008/06/2001-07-27\\_tn\\_briana\\_settlement.pdf](http://www.childrensrights.org/wp-content/uploads/2008/06/2001-07-27_tn_briana_settlement.pdf).

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safely and appropriately, and as I mentioned, it provided this independent group of experts.<sup>8</sup>

The major terms of the settlement were very detailed, spelled out very specific things that had to be done. There were both quantitative results, such as the size of the case loads and worker/child contact, and there were qualitative outcomes for the children, such as moving among fewer foster homes and staying for shorter periods of time in foster care.<sup>9</sup>

Unfortunately, after that settlement agreement in the form of a consent decree was approved by the judge in the summer of 2001, after a public fairness hearing was held in federal court, not a whole lot happened. And in 2003, the attorneys from Children's Rights with local counsel filed a contempt petition against the State<sup>10</sup> for failure to comply with the consent decree. At that time there had been a report<sup>11</sup> by this technical assistance committee that stated a lot of deficiencies in the system that just had continued. Things just hadn't progressed the way we had hoped. The contempt action was actually resolved with a new agreement. There was some discovery taken on the contempt action. We mediated to reach a resolution on that. The contempt action was actually set for trial between Christmas and New Year's in 2003, and for those of you who are still in law school, and I think the practicing lawyers will appreciate this, you try not to have a whole lot of calendar during the holidays. When you see like some

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<sup>8</sup> See *id.*

<sup>9</sup> *Id.*

<sup>10</sup> Contempt Petition, Nov. 20, 2003, *available at* [http://www.childrensrights.org/wp-content/uploads/2008/06/2003-11-20\\_tn\\_briana\\_contempt\\_motion.pdf](http://www.childrensrights.org/wp-content/uploads/2008/06/2003-11-20_tn_briana_contempt_motion.pdf).

<sup>11</sup> STATUS REPORT BY THE TECHNICAL ASSISTANCE COMMITTEE IN THE CASE OF BRIAN A. V. SUNDQUIST TO THE PARTIES AND THE MONITOR (TAC MONITORING REPORT), Dec. 10, 2003, *available at* [http://www.childrensrights.org/wp-content/uploads/2008/12/2003-12-10\\_tn\\_status\\_report.pdf](http://www.childrensrights.org/wp-content/uploads/2008/12/2003-12-10_tn_status_report.pdf).

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big lawsuit is just hanging at that time of the year, I now think, “Oh, those people have been working way too hard; they've messed up their holidays.” But we went to Baltimore for mediation on December 23rd to try to get this resolved so we wouldn't be having this hearing right there between Christmas and New Year's, and mediation worked, and we got it resolved, and we entered a new agreement with some new goals to try to remedy these deficiencies that were ongoing. For example, the report<sup>12</sup> that prompted the filing of the contempt action showed that the State had only complied with twenty-four out of 136 stipulations in the original consent decree. At that time, the Department of Children's Services got a new commissioner, Viola Miller, who had similar experience in Kentucky and was a real asset. She was a joy to work with, and she worked very hard, and, in my personal opinion, did a lot to turn things around.

From that beginning, early in 2004 up to now, we've had a lot of reports filed by this new technical assistance committee. The DCS implemented their Path to Excellence Implementation plan to work on the deficiencies. This technical assistance committee has issued a report pretty much every year. For example, in January of 2006, the report<sup>13</sup> noted that although there had been a lot of progress made in some areas, such as addressing staffing issues, which were initially a big issue, there still hadn't been progress made in improving placement stability, reducing reliance on shelter and emergency placements, obtaining timely permanency, and putting the child in a home that's a forever home, not a temporary fix to a problem. The settlement agreement has been modified several times based on these reports that have been filed by the technical

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<sup>12</sup> *Id.*

<sup>13</sup> TAC MONITORING REPORT, Jan. 19, 2006, *available at* [http://www.childrensrights.org/wp-content/uploads/2008/06/2007-01-19\\_tn\\_briana\\_tac\\_report.pdf](http://www.childrensrights.org/wp-content/uploads/2008/06/2007-01-19_tn_briana_tac_report.pdf).

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assistance committee. Almost every year there's been some modification based on the report. But, all in all, things moved along pretty well and progress has been made.

In late 2009, we were in the news again with this case when our legislature had passed a law<sup>14</sup> that looked like it was trying to tie the hands of juvenile court judges on how many children they could actually place into State custody, and it appeared that the problem was more acute in counties where there is a big meth problem, where kids are coming into custody after a meth lab is busted. And I think we all know meth is a huge problem, and especially here in East Tennessee. I understand that it's maybe not quite the problem in more urban areas. It's more of a rural problem. But this law that was passed by the legislature<sup>15</sup> attempted to put some financial responsibility on the counties and really attempted to limit how many children a juvenile court judge could take into State custody. We felt like that was a big no-no under *Brian A.*,<sup>16</sup> so we filed a supplemental complaint.<sup>17</sup> We call this an "Over-Commitment" law, because it violated the consent decree.<sup>18</sup> That issue was ultimately resolved when the legislature repealed that law, or changed it.<sup>19</sup> I can't remember if they changed it or repealed it. But there was a big change made, so that became a moot issue. That happened last spring in the legislature.

So that kind of brings us up to where we are now. In your materials, there is a monitoring report. This is the most recent monitoring report that's filed by the technical

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<sup>14</sup> TENN. CODE ANN. §37-2-205(f) (2011).

<sup>15</sup> TENN. CODE ANN. §37-2-205(f).

<sup>16</sup> *Brian A.*, 149 F. Supp. 2d 941.

<sup>17</sup> Supplemental Complaint, Nov. 9, 2009, *available at* [http://www.childrensrights.org/wp-content/uploads/2009/11/2009-11-09\\_tn\\_overcommitment\\_law\\_supplemental\\_complaint\\_final.pdf](http://www.childrensrights.org/wp-content/uploads/2009/11/2009-11-09_tn_overcommitment_law_supplemental_complaint_final.pdf).

<sup>18</sup> *Id.*

<sup>19</sup> TENN. CODE ANN. §37-2-205(f) was deleted in its entirety and amended on Mar. 30, 2010 by 2010 Tenn. Pub. Acts 662.



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assistance committee.<sup>20</sup> As you can see, it's quite lengthy, but it has a lot of very detailed information in it. I had sent Jessica the executive summary and introduction. It's kind of interesting and it shows the detail and thought that have gone into this settlement. I also have the 2009 modified settlement agreement and exit plan,<sup>21</sup> which is also a fairly lengthy document and very detailed. If anybody is interested in that, I can e-mail any of this stuff to you electronically if you'd like to see that.

Where we are now, there is still some room for improvement. DCS has made great strides in fixing problems, but there is still some room for improvement. And the specific things that – and this was all in the monitoring report<sup>22</sup> – need to be worked on are improved services for youth transitioning out of foster care. This has been a big issue. Most of us, like Jessica stated when she introduced the program, had parents or at least an adult in our lives that cared about us, that took care of us, read to us, and they didn't just send us out the door when we turned eighteen and say, “Okay, done, you're on your own.” No, they continued to monitor us and help us, get through our college years. But there still needs to be work done in Tennessee on improving services for youth transitioning out of foster care. DCS is certainly doing a better job in finding permanent homes for older youth in foster care. The Department must work harder to support teens leaving foster care without an adopted family or ties to family members. These youth especially need help in developing plans for life after foster care and need connections to stable housing, educational opportunities, and other vital

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<sup>20</sup> TAC MONITORING REPORT, April 6, 2011, *available at* [http://www.childrensrights.org/wp-content/uploads/2011/04/20110412\\_tn\\_monitoring\\_rpt\\_8\\_as\\_filed.pdf](http://www.childrensrights.org/wp-content/uploads/2011/04/20110412_tn_monitoring_rpt_8_as_filed.pdf).

<sup>21</sup> Modified Settlement Agreement and Exit Plan, Nov. 10, 2010, *available at* [http://www.childrensrights.org/wp-content/uploads/2010/11/2010-11-10\\_tn\\_joint\\_exit\\_plan.pdf](http://www.childrensrights.org/wp-content/uploads/2010/11/2010-11-10_tn_joint_exit_plan.pdf).

<sup>22</sup> TAC MONITORING REPORT, April 6, 2011, *supra* note 20.

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services aimed at strengthening their independent living skills.

Another issue or area for improvement is to improve the quality of work on each individual case and the quality of case worker supervision. DCS has implemented a number of strong initiatives to enhance case practice such as holding regular team meetings with youth and their families to develop short- and long-term plans to strengthen the family and keep kids safe. However, its new policies and practices have not yet been fully implemented. For example, this report that came out late last fall<sup>23</sup> shows meetings aren't happening on a regular basis, foster parents are being left out, and many meetings aren't being tracked by the State's data system.

Another issue is improved recruitment and retention of foster parents, especially with respect to relatives of older kids in care. The State has done a commendable job of placing more children with families rather than in institutions. DCS must better engage relatives and recruit kinship homes for children in foster care. Additionally, DCS needs to improve its overall ability to recruit and retain new homes as the steady loss of available foster families is currently outpacing the overall decline in the number of children in foster care.

And finally, there needs to be a focus on finding permanent homes for children who have been in foster care for more than two years. The State must continue its diligent efforts to find adoptive families or legal guardians for children who have been stranded in the foster care system for more than two years. This includes a current initiative to seek outside funding, to expand programs that dig back into a child's history, back into a child's files, to find family members, coaches, teachers, and former foster

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<sup>23</sup> TAC MONITORING REPORT, November 6, 2010, *available at* <http://www.tn.gov/youth/dcsguide/fedinitiatives/TACMonitoringReport11.10.10.pdf>.

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parents who might become a positive connection or even a permanent family for that youth. So while there's still some work to be done, we feel like a lot of progress has been made and the end is in sight for the *Brian A.* litigation. I asked Ira Lustbader, who has worked really, really hard on this case, much harder than I have, just for some thoughts on how this litigation worked, and the importance of it, and he said, “what is so powerful about the *Brian A.* case,<sup>24</sup> as an illustration of effective reform through litigation, is how it has raised the profile of these vulnerable kids and the agency-wide problems to a level where this population can be protected.” Mr. Lustbader reminded me of why I went to law school when he said, “to protect a population like abused and neglected kids – who do not vote, don’t have a lobby, who can be re-victimized while in state custody mostly without anyone even knowing, who are subject to the intractably sad part of society – this elevation of the issues and heightened accountability of an otherwise closed system (due to confidentiality laws) – is why civil rights statutes like section 1983<sup>25</sup> were enacted in the first place.”

I mentioned at the beginning of my comments what a privilege and inspiration it has been to work with the team of lawyers from Children’s Rights especially Ira Lustbader and Marcia Robinson Lowry. There has been a book written about the efforts to reform the New York City child welfare which was a decades-long case for Marcia Robinson Lowry. *The Lost Children of Wilder*<sup>26</sup> by Nina Bernstein is an excellent book on child welfare reform. Thank you.

DEAN RIVKIN: Hi, everybody. It's great to see so many long-time colleagues and former students. Our part of the

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<sup>24</sup> *Brian A.*, 149 F. Supp. 2d at 941.

<sup>25</sup> 42 U.S.C. § 1983 (1871).

<sup>26</sup> NINA BERNSTEIN, *THE LOST CHILDREN OF WILDER: THE EPIC STRUGGLE TO CHANGE FOSTER CARE* (2001).

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program on litigation for change is going to be a snapshot of a project that we have been involved in for the last couple of years through a course called Public Interest Lawyering, Education Law Practicum. It's a clinical course. This is going to be a choreographed presentation. I'm going to set the framework and five of our students are going to tell you different aspects of our work. This part of this panel is different from the major class action that you just talked about. It's more in the public interest realm of a case aggregation strategy, using individual cases, representing clients in individual cases to solve a major problem that I'll tell you about.

We started from a premise that there is a school-to-prison pipeline, it's well documented and we're quite concerned about it in a number of former cases. What we focused on was truancy prosecutions. You see this student behind bars? (Pointing to illustration). The abuses of truancy prosecutions nationwide have surfaced recently. I have an article<sup>27</sup> in your materials that's the final draft of an article that's going to be published in the Duke Forum for Law and Social Change that sets out exhaustively the collateral consequences flowing from truancy prosecutions nationwide, and I'm not going to go into it. In Tennessee, absences – and I'll get to the definition of truancy – are quite substantial, as you can see. These are the Tennessee Department of Education figures<sup>28</sup> on what their definition of truancy or excessive absences are. Nationwide, there are

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<sup>27</sup> Dean Hill Rivkin, *Truancy Prosecutions of Students and the Right [To] Education*, 3 DUKE F. FOR L. & SOC. CHANGE \_\_ (Fall 2011) (at the time of publication, the page number for Dean Rivkin's article was unknown as the article had not yet been published).

<sup>28</sup> TENN. DEPT. OF EDUC. FIGURES, Apr. 12, 2010 (figures faxed to speaker by the Tennessee Department of Education independent of any publication).

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57,000 or more truancy prosecutions of students.<sup>29</sup> In Tennessee, we know that there are thousands of those cases, and yet, when we started looking into this, there's absolutely no case law at all. In discussing this with lawyers around the state, we don't think there has ever been an appeal of a truancy case, and we know that there have only been the rarest number of cases ever tried. The large bulk of these cases are pleas that are taken.

Now, the definition of an unruly child in Tennessee is pretty simple: Habitually and without justification is truant from school.<sup>30</sup> What we, in our investigation and doing our cases on this, found is that the “without justification” part of this statute has not been used very frequently and there has been a conflation of the education statutes that deal with attendance and excessive absences with the juvenile statutes that have a standard that is interpretable, is litigable, involves defenses, as you'll see, without justification.

What we've been doing in this course in a real nutshell – and we've had really intrepid students last year and this year – is ranging through a wide variety of substantive legal issues. A lot of them involve special education, some involve more regular education, issues around alternative education, school discipline, the FERPA,<sup>31</sup> and a whole range of school attendance policies both on the state level and on the local level where there are procedures, and juvenile rules as well, that talk about when cases should be prosecuted. There are a range of mental health issues that we've run into. We have run into a number of TennCare issues, because the only kids who are prosecuted are kids from low-income families; families

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<sup>29</sup> BENJAMIN ADAMS, ET AL, JUVENILE COURT STATISTICS 2006-2007: REPORT, NAT'L CTR. FOR JUV. JUSTICE, March 2010, *available at* <http://www.ncjjservicehttp.org/ncjjwebsite/pdf/jcsreports/jcs2007.pdf>.

<sup>30</sup> TENN. CODE ANN. §37-1-102(25)(A)(i) (2011).

<sup>31</sup> Family Educational Rights and Privacy Act of 1974, 20 U.S.C. §1232g (2011); 34 C.F.R. § 99.1 (2011).

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without resources. That's just an indisputable fact. People with resources can provide alternatives for their children before the case ever gets to court. TennCare issues galore: for example, transportation. When a kid gets sick in a low-income family and the parents don't have transportation, it's very difficult for them to get to the doctor to get the quote or notes that the school requires. We mined the TennCare laws with help from some great legal services lawyers and found that there is an urgent care transportation entitlement.<sup>32</sup> You don't have to make an appointment three days ahead, you don't have to take your kid to the emergency room, because the kid is not that sick, but there is a three-hour window, if you need to take your kid to the doctor, and we've instituted that in several cases. Residential placement is a matter of really last resort. We've also worked on those legal issues.

There are a number of child welfare issues you'll hear about. Juvenile defense, of course, is part of all this. Bullying, part of education I guess, but there is a body of emerging statutory law and case law around bullying.<sup>33</sup> Interesting constitutional law issues. You'll hear in a minute about the right to counsel. A lot of interesting administrative law issues too with respect to State rule-making by the Department of Education in terms of local school system policies and procedures. I mean, these are a range of legal issues that are embedded in the kind of legal work that we've been doing.

We've also been doing a lot of lawyering skills in this course. Our students have been interviewing, counseling, and investigating. They have been doing motion practice, arguing motions. I mean, there is a range of interesting legal skills that are unique to this kind of child advocacy effort. I am then going to turn this over to

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<sup>32</sup> TennCare Urgent Care Transportation Amendment, Sept. 2008 (on file with author).

<sup>33</sup> See, e.g., TENN. CODE ANN. 49-6-1014 *et seq.* (2011).

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Amanda Jay who is going to give you a very brief case study. We've asked our students to do five minutes max about some of their work.

AMANDA JAY: Thank you. Good morning. I'm going to talk to you today about one of our clients, Anita. Anita is a fifteen-year-old girl. During the 2009-10 school year, she missed over one-third of the school year. When I first sat down and interviewed her, the first thing she said to me is, "Look, I'm not laying out of school." And any kid who is that up front and straightforward with you usually has a story, and Anita has a pretty good one.

Just to set up some background about how these petitions are filed, at that point in time the school system was filing these petitions usually without any prior contact with the student or parent regarding the absences. In fact, when Anita's petition was filed, the petition was the first notice that the family received that her absences were a problem.

I'd like to talk to you guys a little bit about justification, because, as Dean said, in many of these cases, the justification prong<sup>34</sup> isn't even discussed at the time. In fact, when Anita appeared in court, she was asked, "Are you absent?" and being generally a truthful child, she said "Yes," and ended up pleading guilty to this charge. She was sentenced to complete a social services program, which is a character education program that really didn't address any of the underlying causes of her truancy or serve any purpose in eliminating her absences. And I'm going to go back to that definition of what an unruly child is. An unruly child is one who is habitually and without justification absent from school.<sup>35</sup> Let's talk a little bit about justification. This particular student suffered from multiple chronic medical conditions and the school was aware of

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<sup>34</sup> TENN. CODE ANN. §37-1-102(25)(A)(i).

<sup>35</sup> TENN. CODE ANN. §37-1-102(25)(A)(i).

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this. Part of her medical condition required her to take pain medication, so, oftentimes, even when she wasn't in need of seeing a medical professional, she was unable to attend school because the pain medication made her sleepy or unable to concentrate, that sort of thing. Anita also comes from a family who is very poor; therefore, they sometimes had trouble getting her to a doctor. And one of the things we've seen is that the school system wants a note for each and every absence. So even if she's absent for one day and has a note, the next two days will not necessarily be excused unless that note explicitly states this is for this time period. A lot of times these families who are involved in truancy prosecutions aren't very sophisticated in dealing with systems, whether it is a medical office, the emergency room, or the social services office at the school. They really don't know what resources are available to help them get through the process. And we came to find out that Anita was also dealing with some pretty complicated mental health issues that no one was really aware of and that weren't really being addressed.

One of the major problems with this case is at the very beginning the school and the court didn't really make any inquiry into why she was absent. When she appeared in court, the question was, "Are you absent?" she responded "Yes." Usually the proof or evidence that's brought against these students is a STAR<sup>36</sup> report. It's generated by the school, and it just lists their absences and whether there was a medical excuse. In this case, with the help of juvenile court workers and the attorney general's office, we were eventually able to get some supports in place for this child. She is now in therapy, the school is more aware and willing to work with her with her medical conditions, and we're also trying to help her catch up in school to address some of her educational needs. This is a great child. She has lots of goals. She hopes to be a nurse. And this is just one

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<sup>36</sup> Student Teacher Achievement Ratio.



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illustration of some of the issues we're dealing with as we do these truancy cases. Thank you.

DEAN RIVKIN: Kate Holtkamp is going to talk about an adult who we were appointed to represent in a truancy case, which is not the gist of our work, but you'll see some of the issues here.

KATE HOLTKAMP: As Dean said, this is the only adult that we represented this year. Jane Doe was a single mom. She's about twenty-five with two kids: a five-year-old, John, and a one-year-old. She was charged with contributing to the unruly behavior of a minor, and this charge was based only on John's thirty-four documented absences during his kindergarten year. When we investigated the reasons behind the absences, it became pretty clear there was some substantial justification for why this kid was missing. In the spring of 2009, Jane was estranged from her abusive husband and had begun her divorce. Around September, she was assaulted by her husband and her five-year-old son was kidnapped, and this went on for about two weeks. John, after being returned to his mom, developed some serious anxiety issues resulting from the kidnapping. On some school days he refused to part with his mom to go to school. Jane attempted to work with him and to get counseling services both through DCS and through the school's guidance department, but wasn't able to get any sort of regular service in place. And getting John to school was particularly challenging for Jane because they lived too close to the elementary school to allow him to ride the bus but too far away for her to walk with two little kids. Further complicating this issue is the fact that she simply could not afford to buy a car and her husband had taken the only family vehicle. She was totally reliant on her friend, who lives about twenty minutes away, to take her son to school, and obviously this was not a reliable way to get him to school.

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In the spring of 2010, John became seriously ill. He was originally diagnosed with seasonal allergies but there was really no serious attempt to get him strong treatments. Two or three weeks later he developed a golf-ball-sized abscess in his throat and required immediate surgery and subsequent hospitalization. Throughout the school year, Jane had been in constant communication with the school, she had spoken with the vice-principal, the school social worker, the school nurse, and her son's classroom teacher about her situation and particularly the custody dispute. The school was aware of her ongoing struggles with her husband and she felt that the school understood why she was having trouble getting her son to school, so she didn't worry a lot about getting precise documentation and medical notes.

At the end of the school year, John's teacher expressed concern to Jane that he had missed so many days and she was a little worried that he might not be ready for the first grade. So, in May, well before she was aware of any prosecution efforts against her, Jane voluntarily enrolled John in summer school. This is not a mom who was neglectful. This was not a mom who was not concerned about her child's education. She was dealing with incredibly difficult circumstances and she just had incredibly limited means.

In July, Jane was arrested by police officers, and as they forced their way into her home, they broke down her door and removed her from bed, handcuffed her, and took her to the penal farm. After being released, Jane was never notified of a court date. She had to call the court herself to make sure she knew when to come, and she was never offered a public defender before her first appearance in court.

We were appointed to represent her in September. In November, we filed a motion to dismiss. We successfully argued that under Tennessee compulsory

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education laws<sup>37</sup> only children age six through seventeen are required to attend school. When we researched it, it became clear that the mom of a five-year-old was under no legal obligation to send her child to school and could not be prosecuted for his unexcused absences.

DEAN RIVKIN: Ebony Connor is going to give you one more snapshot of a case in which we're representing kids.

EBONY CONNOR: Hi. Good morning. I've walked into a lot of classrooms, and I don't think I've ever had all eyes on me. I feel like I need intro music for this. I'm going to talk about two of the students that we've been representing and the economic barriers that have affected them, both in their entrance into the juvenile justice system and their ability to communicate with us and for us to effectively represent them. One of our students is a fourteen-year-old boy, he is an eighth-grader at a local Knoxville area school, and the other is a sixteen-year-old boy also at a local school. They are both adamantly into sports. One is really into basketball. The other is really into boxing. But they have horrible circumstances behind them. They are both intelligent boys who have interests, but don't necessarily have the economic means to do the things that interest them and so it's affected them in a multitude of ways. And that has affected their entrance into the juvenile justice system.

They've had a family member who lost a job and there were some traumatic things that resulted from that, including homelessness. As homeless students in the area, they were staying at one point in a homeless shelter, at another point they were staying with friends, and at a third point they were staying with friends that were an hour-and-a-half outside of Knoxville and were being transported in. All of these things resulted in their irregular school attendance, but not necessarily without justification for not

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<sup>37</sup> TENN. CODE ANN. §49-6-3001 *et seq.* (2011).

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being in school. They also don't always have adequate access to health care, as Dean mentioned very early on. They have TennCare, but there are programs that are available through TennCare that most aren't aware of, including transportation located within three hours distance. They do not always have access to a car, so if they weren't aware of TennCare-provided transportation and they needed a doctor, they weren't aware that they could call this service, so they weren't getting to school and weren't coming with doctor's notes when they were able to get back. As I said, they also don't have adequate personal transportation. They have a vehicle but it hasn't always been in good shape and there have been some instances where they just haven't had anything. That has affected the parent's ability to get them to school when they weren't living within an area where the bus picked them up and dropped them off. This has also affected their ability to get to court and to status hearings when required to do so. Again, as people with very little economic means, they haven't always had adequate communication devices. So it has been difficult for them to contact the school, doctors, and us. These are issues that have to some extent led them into the juvenile justice system. But in terms of my representation of them and our working with them, we found that it's very difficult to have them understand the importance of what is going on if we're not able to actually get in touch with them, and that's all based on their economic status. And because they are fourteen- and sixteen-year-old boys who have interests, they've developed some anger management issues that are a result of a lack of opportunities that they do or don't have because of their family's economic status.

After we were appointed to represent them, there has been some dramatic and some amazing changes. We have absolutely been advocating very heavily for a change in the truancy system, but a good portion of what we've been doing with regards to these students is advocating for

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some of the social programs, that had the school system or community workers been involved in, may not have prevented these students from entering the juvenile justice system. They are now aware of programs and organizations that are designed to better serve them and their family, which actually helps them deal with some of the underlying issues that resulted in their not attending school regularly. They're aware of health programs that are available to them, including the transportation that I've mentioned and that Dean mentioned. They're aware of extracurricular activities. Because the absences from school affect their grades, they're not always eligible for school programs, but there are outside programs that are available to them that they are now aware of them. There have also been some educational changes with them as a result of our representation. They are now aware of the services that have always been available that the school did not make known to them or most others that we've worked with. And so I can say that while we are strongly advocating for a change in the truancy process, a lot of what we've done is to advocate for social change, and these are all things that would have been available to them had an interested party taken interest prior to them entering the juvenile justice system. Thank you.

DEAN RIVKIN: Our final two presentations are going to be nutshells of a couple of legal issues that we have encountered in our practice. And Brennan Wingerter is going to present the first one on guardians ad litem.

BRENNAN WINGERTER: Good morning. I'm going to talk to you all about the role of Rule 40<sup>38</sup> GALs in truancy cases. So starting with Tennessee Rule of Juvenile Procedure 37,<sup>39</sup> as you can see under Rule 37(a), which

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<sup>38</sup> TENN. SUP. CT. R. 40.

<sup>39</sup> TENN. R. JUV. P. 37.

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governs the appointment of GALs in delinquent and unruly proceedings, truancy, by definition, is an unruly offense.<sup>40</sup> Then we also have Rule 37(c),<sup>41</sup> which governs the appointment of GALs when there has been a report of harm. Now, under T.C.A. Section 37-1-403, this report of harm contemplates that there is a child who is suffering from or has sustained any wound, injury, disability, or physical or mental condition that has been caused by brutality, abuse or neglect.<sup>42</sup> So under this statutory scheme, with truancy being an unruly defense, if the court decides to appoint a GAL in a truancy case, Tennessee Rule of Juvenile Procedure 37(a)<sup>43</sup> would apply. However, sometimes GALs are appointed in truancy cases under Rule 37(c).<sup>44</sup>

So let's take a look at what that does. When a GAL is appointed under Rule 37(c),<sup>45</sup> you can see that Tennessee Supreme Court Rule 40<sup>46</sup> comes into play, and DCS becomes involved, so a guardian should be appointed for the child and the indigent parent should receive an attorney. But, in a truancy case, those next steps don't come into play. DCS doesn't become involved and the parent usually doesn't get an attorney. So if I'm a GAL and I've been appointed to a truancy case under Rule 37(c),<sup>47</sup> I'm kind of in an awkward position and I'm probably thinking, "What is my role? What should I do?" So, taking a look at how the statute<sup>48</sup> works, when there is an appointment under

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<sup>40</sup> TENN. R. JUV. P. 37(a).

<sup>41</sup> TENN. R. JUV. P. 37(c).

<sup>42</sup> TENN. CODE ANN. §37-1-403 (2011).

<sup>43</sup> TENN. R. JUV. P. 37(a).

<sup>44</sup> TENN. R. JUV. P. 37(c).

<sup>45</sup> TENN. R. JUV. P. 37(c).

<sup>46</sup> TENN. SUP. CT. R. 40.

<sup>47</sup> TENN. R. JUV. P. 37(c).

<sup>48</sup> TENN. CODE ANN. §37-1-403.

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37(c),<sup>49</sup> it's clear that Tennessee Supreme Court Rule 40<sup>50</sup> does apply.

So let's take a look at Rule 40.<sup>51</sup> As you can see, it's basic. It starts off the application, and it does apply under Rule 37 of the Tennessee Rules of Juvenile Procedure. And Rule 40 goes on to set forth some of the basics of a GAL who has responsibilities under that rule. For example, it defines a guardian ad litem as a lawyer appointed by the court to advocate for the best interest of a child and to ensure that the child's concerns and preferences are effectively advocated.<sup>52</sup> A key to Rule 40 GAL lawyers is that the child is the client of the GAL, not the court. And, with that in mind, Rule 40 goes on to lay out some of the specific responsibilities of Rule 40 GALs. For example, conducting an independent investigation of the facts.<sup>53</sup> This can include reviewing court files, medical and school records, and interviewing parents, mental health professionals and caseworkers.<sup>54</sup> It also goes on to state that GALs' responsibilities include explaining the litigation process, which means consulting with the child.<sup>55</sup> Constant communication with the child client is essential to the GAL's responsibilities. Further, Rule 40 has a provision where responsibility for the GAL is to consider resources that are available through programs and processes.<sup>56</sup> And I specifically want to point out, because Dean mentioned it earlier, when there's a special education issue involved, GALs can and should remember that there are also federal

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<sup>49</sup> TENN. R. JUV. P. 37(c).

<sup>50</sup> TENN. SUP. CT. R. 40.

<sup>51</sup> TENN. SUP. CT. R. 40.

<sup>52</sup> TENN. SUP. CT. R. 40(c)(1).

<sup>53</sup> TENN. SUP. CT. R. 40(d)(1).

<sup>54</sup> TENN. SUP. CT. R. 40(d)(iv).

<sup>55</sup> TENN. SUP. CT. R. 40(d)(2)-(3).

<sup>56</sup> TENN. SUP. CT. R. 40(d)(5).

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law processes available, such as IDEA<sup>57</sup> and a disability statute<sup>58</sup> that are there.

Some other responsibilities include ensuring that the child is prepared to testify and making the child feel comfortable.<sup>59</sup> And another big one is the responsibility to advocate the position that serves the best interest of the child.<sup>60</sup> And the bottom line with that responsibility is that the GALs should act as lawyers. That includes everything from the ethics requirements of competent representation, such as filing pleadings, attending all meetings and hearings, calling witnesses, and even making opening statements and closing arguments. And, to sum up, these excerpts are from a booklet<sup>61</sup> that was put out by the Tennessee Youth Advisory Council, actually for children who have GALs appointed to them, and I think it's a very good summary of Rule 40 in layman's terms that the bottom line is that GALs in truancy cases, are not cops, or social workers. They do not work for the judge, they don't work for DCS, and they don't work for the school system. GALs at the end of the day are lawyers, and they are lawyers who, as these brochures really break down for the child clients, represent their clients, and those clients are the children to whom they are appointed in court. Thank you.

DEAN RIVKIN: Erin Raines is going to talk about a complicated issue that –

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<sup>57</sup> Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (1990).

<sup>58</sup> Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* (1973), § 504, effectuated by 34 C.F.R. Part 104.

<sup>59</sup> TENN. SUP. CT. R. 40(d)(6).

<sup>60</sup> TENN. SUP. CT. R. 40(c)(1).

<sup>61</sup> TENNESSEE YOUTH ADVISORY COUNCIL, ARE YOU A YOUNG PERSON IN A CHILD ABUSE OR NEGLECT CASE IN JUVENILE COURT? YOU SHOULD HAVE A G-A-L LAWYER (Dec. 2004), *available at* <http://www.tba.org/sections/JuvenileLaw/gal.pdf>.



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ERIN RAINES: In a short amount of time.

DEAN RIVKIN: – in a very short period of time – and that is the right to counsel or the potential right to counsel in truancy prosecutions.

ERIN RAINES: Through the research with Dean and some of our case exposure this semester, we've seen various issues with our clients where now more than ever we have realized that not having a right to counsel or counsel representation in a truancy proceeding presents a significant risk to the child and the parent. In the United States, there are forty-five states that address truancy issues, and in thirty states there is a statute that automatically provides the child with the right to counsel.<sup>62</sup>

Tennessee is, unfortunately, not one of those thirty states.<sup>63</sup> The right to counsel for children in initial truancy hearings is consistent with the prevailing trend of states nationwide and continues to guard the rights of children by ensuring them adequate legal representation in juvenile court proceedings.

So why is the right to counsel important? Denying children the assistance of counsel at their initial truancy hearing creates a substantial risk for the erroneous deprivation of a meaningful education for that child. And by giving a right to counsel to a child, the attorney can help by discovering various reasons for the child's truancy, explaining the truancy proceedings to the child and the parent, ensuring adequate procedural protections leading up to any truancy proceeding. After the fact, counsel may

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<sup>62</sup> Juvenile Law Center as Amici Curiae Supporting Respondent, *Bellevue Sch. Dist. v. E.S.*, 199 P.3d 1010 (Wash. Ct. App. 2009), available at

[http://www.jlc.org/litigation/Bellevue\\_School\\_District\\_v.\\_E.S.\\_/](http://www.jlc.org/litigation/Bellevue_School_District_v._E.S._/).

<sup>63</sup> *Id.*

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present evidence on behalf of the child, and build a record, and have the opportunity to bring an appeal should there be one or should there be an erroneous decision on behalf of the child. Also, initial truancy proceedings and not having a right to counsel jeopardizes the children's fundamental interests in physical liberty, education and privacy. The educational interests are laid out in *Goss v. Lopez*,<sup>64</sup> which states that any State action that potentially interferes with a child's education, such as suspension from school, requires due process protections.

The most important case, which is in the State Supreme Court of Washington, is *Bellevue School District v. E.S.*<sup>65</sup> This is a case where a child had a truancy petition initiated against him by the school system. He was not afforded a right to counsel at the initial truancy hearing, but he was later given a right to counsel at the contempt part of the hearing, and the trial court held that this was okay because that counsel is only appointed when a child is facing possibility of losing her liberty and the school board felt at the initial hearing phase that E.S.'s liberty was not at stake. On appeal, the issue being looked at is that the trial court entered that there was no due process right to counsel at an initial truancy hearing when the hearing engaged the fundamental right to education, and the truancy finding could possibly lead to incarceration in a later proceeding.<sup>66</sup>

Basically what this case will hopefully demonstrate, and what Dean is using this case to argue hopefully once it is decided by the Washington Supreme Court,<sup>67</sup> is that

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<sup>64</sup> *Goss v. Lopez*, 419 U.S. 565 (1975).

<sup>65</sup> *Bellevue Sch. Dist. v. E.S.*, 199 P.3d 1010 (Wash. Ct. App. 2009). The Supreme Court of Washington ruled on *Bellevue* in June 2011, holding that students do not have a right to counsel at truancy hearings. *Bellevue Sch. Dist. v. E.S.*, No. 83024-0, 2011 Wash. LEXIS 392 (Wash. June 9, 2011).

<sup>66</sup> *Bellevue Sch. Dist.*, 199 P.3d at 1013.

<sup>67</sup> *Contra Bellevue Sch. Dist. v. E.S.*, No. 83024-0, 2011 Wash. LEXIS 392 (Wash. June 9, 2011).

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failure to provide counsel and to require proper notice or a sufficient petition resulted in the denial of due process and the order should be set aside, therefore providing a potential change in the law in other states that do not have a right to counsel, Tennessee included, for the ultimate goal of protecting the fundamental interests of the child during any truancy proceeding.

DEAN RIVKIN: Great. Thank you. Has there been change? There has been change. And it's not only because of our work. The school system has become much more aware, maybe because of our work, that there is a need to prescreen before petitions are filed. Change also may be coming because we filed several petitions to vacate clients' convictions or adjudications from juvenile court. There's a very generous post-adjudication statute for juveniles in Tennessee that is elaborated on in the Rules of Juvenile Procedure,<sup>68</sup> and we're raising issues that we hope will help improve the system even further for the court-involved children and youth who are there. So thanks, everybody.

ROBERT SCHWARTZ: Thank you, Dean, and Jackie, and all the students. I'd like to spend a few minutes talking about our experience in litigation around children's issues at Juvenile Law Center where I've been since 1975. And I'll discuss a little more of our history and some recent work during the lunch talk that I'm scheduled to give about the Kids-for-Cash Scandal, which also implicates some of the right to counsel issues clearly that you heard about this morning.

I think that we, over the years, have struggled to find the appropriate place for the affirmative class action litigation, the damages litigation, the appellate practice, and law reform vehicle, because litigation in the wrong hands can be a pretty powerful and destructive tool. In the right

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<sup>68</sup> TENN. R. JUV. P. 36; *see also* TENN. CODE ANN. §37-1-139 (2011).

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hands, with the right defendants, it can be quite effective, but the fact is that lawyers for kids don't run anything, so we're only as good at the end of the day as the people who run the systems for children. In a way, the strategy of litigation from beginning to end, including the discovery, the demand letters, the follow-up, and implementation is about figuring out a way to use this vehicle to help people who run the system for a living succeed, and then trying to figure out what success means in the child welfare system. I think it's the difficulty of figuring out what that means that has plagued child welfare litigators as well as child welfare administrators probably for the last thirty or forty years since litigation has taken hold.<sup>69</sup>

I thought it would be useful to get some examples of some juvenile justice litigation that we've been involved in to show the contrast between litigating in juvenile justice and litigating in child welfare. One I think is relatively straightforward and easy; the other is an example of litigation, as Jackie described, that begins with investigations twenty years ago, continued with the filing of a lawsuit in 2000, and ends up with a Pentagon-paper-sized document of the technical assistance team in 2011 and how you find the right balance in the course of litigation.

One of the major differences between litigating juvenile justice versus child welfare is that juvenile justice litigation is often about discrete actions to prevent harm, like the use of isolation, physical abuse of kids in facilities, or overcrowding of State training schools or juvenile detention centers. So, we have brought and we continue to bring at Juvenile Law Center those kinds of lawsuits that are targeted to a particular problem. While we often have hurdles in making sure that we've identified the rights that are at stake to overcome the motions to dismiss as well as

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<sup>69</sup> See generally *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966).

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motions for summary judgment, if we get relief, the remedy is pretty easy and straightforward. You have isolation, you end isolation, or you provide that it's of very limited use with people coming by the door looking in every ten or fifteen minutes, and you define the purposes and you solve the problem. If you have overcrowding, it's fairly straightforward to get a cap on an institutional size so the children are safe inside a building. The issue of kids being hurt by staff is a thing that can be dealt with in numerous ways that are fairly straightforward.

We have done work on slightly more complicated issues, for example, around school re-entry, which is I think a corollary to the truancy issue since many kids are truant after returning from delinquency placements and much of the truancy is related to school policies. An example is in 2002, the Pennsylvania General Assembly passed a law<sup>70</sup> saying that students in the school districts of the first class in Pennsylvania were not allowed to be in Philadelphia public schools if they were adjudicated delinquent. They weren't allowed to be in school if they were adjudicated delinquent. It was a generalized law that applied only to one county and one school district in Philadelphia. We at Juvenile Law Center share space with Education Law Center, which is a happy collaboration, and together we filed a lawsuit<sup>71</sup> and the legislature changed the law to say, "Okay, you can stay in school if you're in school, but you're not allowed to return to school if you've been in a delinquency placement." That, again, was a fairly narrow targeted issue that we could take on that turned out to be more complicated than we thought it should have been in

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<sup>70</sup> Act 187 of December 9, 2002, No. 187, § 12, 2002 Pa. Laws 1472 (amending the Pennsylvania School Code, 24 PA. STAT. ANN. § 21-2134 (West 2011)); H.B. 2644, 186th Gen. Assem., Reg. Sess. (Pa. 2002); 24 PA. STAT. ANN. §21-2134 (West 2011).

<sup>71</sup> See generally *JLC Working in Partnerships to Ensure Quality Education for Returning Delinquents* (Juv. L. Ctr., Philadelphia, Pa.), Dec. 2004, available at <http://www.jlc.org/enewsletter/19>.

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terms of the right to relief. We managed to get an appellate court,<sup>72</sup> but not a trial court, to agree that by having a complete ban for all kids on return to school, that there was a violation of due process. There was no hearing or judgment. As you mentioned about *Goss v. Lopez*<sup>73</sup> earlier, this was related not to the suspension or expulsion way, but in a return to school way, and we were able to at least get kids back into a transitional school that would evaluate where they should be, because we didn't want kids going back to a school in which they were involved with gangs or likely to be victims of crime and where they might not succeed academically. But that was an example of a discrete piece of litigation that had an impact and where we could pull something off. It was also pretty clear to the public what was at stake; we could tell the story pretty clearly.

Major class action child welfare litigation has had mixed results in the country. I think you've had movement here in Tennessee. I think there's been some good movement in New Jersey. New York City, a state unto itself, had its own child welfare litigation that has changed things quite considerably, particularly after the recent commissioner came in several years ago, including a reduction of the foster care population from about 50,000 to about 15,000 in New York City alone.<sup>74</sup> It was done in a way that made the system more manageable through placement prevention as well as permanence and it gave the caseworkers a fighting chance to success.

But it hasn't succeeded everywhere. In Philadelphia, in 1990, Children's Rights came in and we had lots of

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<sup>72</sup> D.C. v. SDP, 879 A.2d 408 (Pa. Commw. Ct. 2005).

<sup>73</sup> *Goss*, 419 U.S. 565 (1975).

<sup>74</sup> Press Release, New York City Administration for Children's Services, Administration for Children's Services Unveils Major Initiative to Strengthen New York City's Child Welfare System (Feb. 3, 2005), available at [http://www.nyc.gov/html/acs/html/pr/pr05\\_02\\_03.shtml](http://www.nyc.gov/html/acs/html/pr/pr05_02_03.shtml).

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debates about class action, but we declined to participate in the litigation that Children's Rights brought<sup>75</sup> that lasted I think for the next nine years in the state because we felt that targeted litigation would be more effective, and Children's Rights has a history of comprehensive litigation. The debate basically is whether or not targeted litigation is the leverage point that many of us think it is, or merely a way to displace the problem. You get targeted solutions in your narrow litigation, but the argument is that every other part of the system suffers. Children's Rights, supported by many others in the field, believes that you really need a comprehensive approach; otherwise, you end up with a shifting of resources and you always have a part of the system that ends up doing a disservice to children and families.

There are others of us who think that comprehensive litigation is too big to manage in the child welfare system and ends up having the lawyers as well as the judges try to balance competing values. Because kids' rights change overtime, the issue of permanency is complex. When does it really kick in? The Adoption and Safe Families Act of 1997<sup>76</sup> added requirements for states to do permanency reviews after kids are in placement for fifteen months out of a twenty-two-month period. Courts are still reluctant to do that when siblings are involved and it turns out that it's been much more complicated in implementation. When does a kid's right change from reunification to placement? How does that get enforced? How does it get implemented? All of these things are part of the overall massive comprehensive litigation equation, and I would say that there have been some unresolved philosophical debates about the merits of this kind of litigation.

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<sup>75</sup> Baby Neal v. Casey, 43 F.3d 48 (3rd Cir. 1994).

<sup>76</sup> The Adoption and Safe Families Act of 1997, 42 U.S.C. § 629a (1997).

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The other problem is that it's hard for litigators to create good systems. I think we are much better as lawyers at preventing harm to kids by stopping things like overcrowding than at creating good social work practice. An example I think that Jackie used so well was the difficulty we have now in Tennessee of improving the individual caseworker's work on individual cases. That's a chronic problem everywhere in the country, in part because turnover is high, supervision is lousy, pay is low, and the mission is impossible. The individual case work figuring out whether decisions are good or bad ends up being quite difficult unless you have something tragic happen. When something tragic happens, that elevates these systems back into the limelight and you have yet another either bit of litigation, another blue ribbon commission, or another set of newspaper exposés to deal with as litigators.

We've had some mixed success; I think we've had some targeted success as well with the right administrators at the right place at the right time. You described that in correcting the change in administration here in Tennessee it really did help and it mattered; having somebody who's welcomed the technical assistance matters. I always thought that as a litigator and somebody who uses a whole range of strategies for social change, I always needed to have really good defendants in place in order to succeed, so that executive search became part of our change strategy so that we could help states find people we could sue who could succeed in the job. You need people who can actually deliver and make the changes in their systems. I mentioned that we've brought litigation around kinship care to improve certification and payments of kinship care. Many relatives take on a role of foster parents, agree to be supervised, participate in case planning and court reviews, but have not been compensated for their *per diems* for food and clothing. We've litigated, and others have, over sibling visits where siblings have been kept apart, and I think some targeted litigation has some merit as well. I think it depends



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on context; it depends on resources. Comprehensive is inevitably a decade's worth of litigation. If you're going into it, you should be ready for it, whereas the other stuff can be a little more targeted.

There are I think opportunities for appellate practice to be a social change vehicle, an assist-in-improvement vehicle, if you have lawyers in these cases that build a body of law that regulates systems and can be quite effective as well. Of course, for that to work, you need a couple of things in place to happen. One, you actually need lawyers representing clients in the case. What we heard from the students and from Dean about truancy is an example of the perils of not having attorneys in place at the beginning of a case because – and we see this, I'll talk about this in my discussion of the Kids-for-Cash Scandal – the idea that a kid is not being placed at the beginning but agrees to conditions that lead to placement later based on facts that are wrong to begin with are reasons pretty clearly that lawyers are necessary at the outset of these cases.

Even with lawyers, however, we in our field have done a terrible job of building a body of appellate case law in the child welfare system or the juvenile justice system, for example. You take a look at most case law in the large umbrella of family law and, for the most part, it's in domestic relations: termination of parental rights cases are the kinds of cases in which parents are actively involved. There is not a culture of appeal in our practice, and I think that our failure to build that culture has hurt kids and families across the country. There are a lot of reasons for that. One, the time-line for appeals doesn't really match kids' life cycles and the case cycles, so at least – and I don't know how it is here in Tennessee – but in Pennsylvania you're not going to have an appeal decided before the next six-month case review, or in Allegheny County, the western part of Pennsylvania. They review cases in foster care every three months. There's no appellate process that can work in that field.

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There's a culture. You have a lot of very good judges who care about kids deeply and who are really insulted when their views about best interest are challenged on appeal. I find the most difficult judges I've ever had to deal with are judges who cared the most because they often took the most liberties with the law, though not always as you'll hear. The appeal process changes the relationship and judges often did not like those of us in their courtrooms when we challenged their efforts. But we need an appellate body of law because, for example, "without justification" needs a definition. In every other area of the law, appellate courts help define what those words mean and give guidance to trial courts so that we don't have to make this up every case. Our law is particularly bereft of that.

There's also the issue of what our role is as lawyers that also prevents us from often taking appeals. I have been an opponent of the best interest lawyering for kids since the first time I screwed up a kid's life by arguing for her best interest rather than what she wanted me to do and discovered that she had no reason to talk to me a second time: when she got in trouble on the delinquency side and I was her best interest lawyer on the dependency side, why she would trust me not to sell her down the river on the delinquency side as well? But one of the other things is that when we're arguing for best interest, we're putting ourselves in a position of offering evidence usually not subject to cross-examination. We pretend to be experts that were not. I've been around for thirty-six years doing this, and I would find it very dangerous to consider me as an expert on a child's life not subject to cross-examination, but many judges want me to be exactly that: "What do you think should be done in this case?" and have that unchallenged. Then when I say it and it's paid attention to and my client doesn't like it, I'm supposed to appeal my own judgment. We're put in a position that is bizarre and untenable. We are trained as lawyers and I think it's important that we listen to our clients and put on the best

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case we can and, where appropriate, appeal errors of law or abuses of discretion, but not pretend to be something that we're not.

I would say that in Pennsylvania, where we have ten definitions of dependent child, we have actually the worst of all worlds. In some cases of a dependent child the lawyers are expected to be best interest attorneys, and in some instances, which are the old status offender cases of truancy and ungovernability that were once in the delinquency side but are now, since the mid '70s, in the dependency side, we're supposed to be client-directed lawyers.<sup>77</sup> So we would solve your problem in a pure truancy case by being client-directed, but if the truant was also abused, we would have a really hard time of figuring out what exactly we are. In terms of law reform in the individual case level, the role matters as well as being around; ninety percent of this is showing up, and figuring out the right litigation vehicle at the appropriate time is important on the broader system reform litigation side. I'll leave it there because I know you probably have questions for the students, for Jackie, Dean, and me.

SALLY GOADE: I'm Sally Goade, and I'm the clerk for the Court of Criminal Appeals but I'm interested in practicing in this area of law. In an earlier life I was a middle school English teacher in Nevada and Idaho and I raised a child in those states, and I supervised student teachers in upstate New York. I don't know quite what the policy was there, but I was flabbergasted to learn that they have to have a doctor's note for every absence. I know it sounds like a little thing, but I'm thinking this has got to be a nightmare for the schools to enforce that. As a parent, it

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<sup>77</sup> SUSAN SNYDER, PROMISES KEPT, PROMISES BROKEN: AN ANALYSIS OF CHILDREN'S RIGHT TO COUNSEL IN DEPENDENCY HEARINGS IN PENNSYLVANIA n. 18 (2001), *available at* [http://www.jlc.org/publications/promises\\_kept\\_promises\\_broken/](http://www.jlc.org/publications/promises_kept_promises_broken/).

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would have driven me crazy. I realize that there are probably a lot of Knox County parents here and I'm just out of the loop, but to have to have a doctor's note for every day that my son was sick, and he wasn't sick a lot, but I always thought that was my judgment, whether to keep him home. And for the students I had, that they would have had to have that, if they were sick three days, a note every day. I just wondered is this something that's common throughout Tennessee, how long has it been in place, and am I overreacting or is it a real problem with the truancy laws that people just can't get the doctor's notes? It seems like a huge tax on the health care system.

DEAN RIVKIN: My colleague, Barbara Dyer, who is an adjunct member of the faculty who helps supervise our students, she can answer that question for us.

BARBARA DYER: They do have to have a medical excuse once they have exhausted their ten parent notes.<sup>78</sup>

SALLY GOADE: Okay. Thank you.

BARBARA DYER: The parent can make that judgment ten times during a school year. But after those ten times, then any absence should be a medical note from a doctor.

SALLY GOADE: Thank you for that clarification. Now I'm not as flabbergasted.

COLLEEN STEELE: But in following up on that, I had a client seventeen years old, just at the age where she was still compelled to be in school, and she was undiagnosed. She had had several absences where Mother took the option and said, "No, I'm not sending her to school today, she just

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<sup>78</sup> KNOX COUNTY SCHOOLS PROCEDURES HANDBOOK: ATTENDANCE (May 2003).

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can't function in school.” And then they started getting her to the doctor; they did all the diagnostics. Doctors would write an excuse for one day, even though some of the treatment and diagnostic tools that the doctors were actually using kept the child out of school for two days. So we have one day of unexcused absence even though on one of those two days she was actually at Children’s Hospital of East Tennessee taking follow-up tests that had been ordered by her doctor. Do we not have a uniform policy for excused versus unexcused medical absences so that the parents know to ask for a two-day absence slip? Because, otherwise, it gets to the point where we’re litigating it and the parents don’t know. We could actually prevent a lot of this if they knew what the policy was. I don’t think we even have a uniform policy throughout Tennessee that go from one county to the next, do we?

DEAN RIVKIN: No. The Tennessee Department of Education has a very, very skimpy sort of discussion of what are excused absences, and it comes from the attendance statutes.<sup>79</sup> But what we’ve heard articulated about this day-for-day need for notes is that it’s not administrable. It’s so difficult to administer by school people and to determine, they say, whether the note is for one day and the child is absent for three or four after that. Are those three days excusable or justified? This is an area, one of many in attendance and truancy, which is of course a key issue these days under No Child Left Behind<sup>80</sup> and with the whole drop-out phenomenon and push-out phenomenon. This is just one of many areas that we’ve identified that really need statewide consistency; the education statutes say these policies should be consistent, and they’re not, and there are all these conundrums in there that make this system, frankly one of the least transparent

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<sup>79</sup> See TENN. CODE ANN. §37-1-102(b)(25)(A)(i).

<sup>80</sup> No Child Left Behind Act of 2001, 20 U.S.C. §6301 *et seq.* (2001).

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and accountable systems that I've ever encountered in four decades of a legal career. I've said to a number of people, after forty years of being a lawyer I'm in truancy court and yet the issues are as complicated any I've encountered in any other court.

JAMES CARNEY: I had the privilege of sitting on a campus court in Anderson County and we see these cases in detail with a panel with school and DCS present and I can tell you that every one of these is different, and a lot of this problem would be resolved if the school administration had a counselor with the authority to review these things. You get a parent who takes over custody halfway through the year, doesn't know what the rules are, doesn't know what the kid has done before, and doesn't realize that in some jurisdictions if you bring the note in three days late and has got a kid who doesn't know to drop it off, it's an unexcused absence. Five times, automatically prepare a citation. We don't do this with traffic citations. If you're driving down the road, you've got your pregnant wife in the right seat, and you're going to the hospital, the officer has the ability to say, "Well, maybe I'll give you an escort." Here, you have a kid dragged through this process, the parents dragged through the process, because of a rule. So we maybe need to look at it systemically and say, "Maybe as a last resort, yes, you may need access to an attorney to represent you, but you shouldn't have got there, your door shouldn't have been knocked down."

DEAN RIVKIN: You're raising a really important aspect of this system. There are screens built in, there are procedures that school systems are obligated to have and go through; fairly substantial obligations for interventions. That is one of the issues that we're raising on appeal, failure to follow those. And then of course there is Rule 8

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and 12 of the Juvenile Rules<sup>81</sup> that are screens basically, where court officials are obligated to look at cases to determine whether they should go forward and where there is an opportunity there to say, “Wait, there is justification outside of the sort of number of absences that might exist.” But, you’re right, at the front end of the process is where a lot can and should happen. Because at the back end of the process, as we all know, the juvenile court, as much good intention as exists, doesn’t have the resources to make things happen for a child.

JAMES CARNEY: Just to follow up, the idea of gatekeepers at each point – so a school counselor or a teacher could investigate this first and possibly write an exception that could be reviewed before it goes to the judge, the YSO, the youth services officer, to have the ability to review this and decide if we need – should be statutory. There should be some way to prevent in effect what is abuse of privilege when you have these things running forward.

DEAN RIVKIN: There are in our practice a lot of cases that we know are ultimately screened out. We may be the victim of seeing the really hard cases. But in most of the cases that we’ve seen, these cases could and should have been screened out also earlier. And, as I said before, there has been change. Bob’s point is right, in the administration, for example, of the special education program here in this county, which is a bellwether for a lot of East Tennessee, there has been a promising change to live up to, for example, what’s called the Child Find obligation under IDEA,<sup>82</sup> which obligates school systems to identify students who potentially have educational disabilities. All the figures show that kids with educational disabilities

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<sup>81</sup> TENN. R. JUV. P. 8; TENN. R. JUV. P. 12.

<sup>82</sup> 20 U.S.C. §1412(a)(3) (2010).

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represent forty to seventy percent of the number of court-involved children and youth. That's critical.

JAMES CARNEY: And this is great in Knox or in Anderson where you have resources and a well-funded school system. You get into Scott and Campbell and some of the counties where they have very little resources, I sit in court on those days and watch these poor juvenile judges deal with these and they're getting them cold.

DEAN RIVKIN: Yeah.

ADRIAN BOHNENBERGER: Adrian Bohnenberger from the Montgomery County Bar. What I'm running into and what baffles me beyond all belief is the situation I had with a child with a chronic illness that caused nausea every so often. If the child got sick at school, the school system, because of the lack of school nurses, called the parents to take her home, and she had to be taken home even though the nausea was something that passed relatively quickly. If the child had nausea, she had to go home. But if they didn't take the child immediately to the doctor and get a doctor's note, it was an unexcused absence even though the school was the one who sent her home. They know what caused the problem, it's been well-documented, well-treated, it's not something that is going to go away, and she's on whatever medication she can be on, it was still an unexcused absence. And it took a substantial threat of litigation to get the school to back off. It just baffled me.

GARY FOX: Gary Fox from Loudon County Bar. Are there any requirements for providing transportation for kids that are placed in the alternative schools if it's located a distance away from their home? I've got a case right now where I'm a guardian ad litem for a young man who's been doing very poorly in school, not doing homework, and is in alternative setting – he can either receive three hours of



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homebound instruction a week with an assignment or go to the alternative school, and is really doing a very good job with that. He's about fifteen minutes away, eight miles from his home to this, and they don't provide transportation for that.

DEAN RIVKIN: We litigated a case from 2004 to 2008 called *C.S.C. v. Knox County Board of Education*.<sup>83</sup> There are a couple of appellate court decisions. One of the issues we raised after we established the entitlement to alternative education, and the school system set up a night program for all students who were suspended or expelled for over ten days was transportation. We felt there needed to be an entitlement to transportation that went along with the entitlement to some type of alternative education. We lost that issue in the court of appeals, but we think it could be maybe revisited in the right kind of case. But I'm afraid the same is true here in Knox County; a night program that goes from 4:30pm to 7:30pm really does exclude a number of students who are not on transportation lines, and even if they are, in the wintertime, going home at night. It's part of this reform that needs to take place in terms of looking at issues of attendance and continuing education. There's been a heightened awareness of the need to keep kids in school because of No Child Left Behind.<sup>84</sup> Whatever one may think of that statute overall, there certainly has been a much more focused attention on every kid. These are systemic problems.

ROBERT SCHWARTZ: It's also an example of where lawyers for kids working with others ought to be working to get the legislation changed. I mean, there is one area in federal law where kids do have a right to transportation is

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<sup>83</sup> *C.S.C. v. Knox County Bd. of Educ. et al.*, No. E2006-00087-COA-R3CV, 2006 WL 3731304 (Tenn. Ct. App. 2006).

<sup>84</sup> 20 U.S.C. §6301.

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when they're homeless, and the McKinney-Vento Act<sup>85</sup> gives kids a right to go to their home school and have transportation provided. There have been a number of states that have been giving similar rights to foster youth: when they change foster homes they leave different boundaries to be able to stay in their home school. States are divided on whether they provide transportation so kids can get back to their own school. If you have a multi-tier strategy as an advocate to change the legislation and then litigate over the legislation that you've helped enact it's easier than trying to create a right through litigation in the first place.

DEAN RIVKIN: One of the reasons we advocate so strongly for evaluations for students for potential special education services is that if a student comes under that umbrella, there's no cessation of education allowed, and, as a related service, there is transportation. Obviously not every student is going to be eligible, but that's another aspect of this issue. I'd be glad to revisit this with you at some time.

RENEE DELAVE: My name is Renee DeLave and I worked in a rural school county for a number of years, and if I may offer an observation and then a question connected it. It really seems to me that the schools are very, very ambivalent about whether they want to create an educational environment, a beloved community type of environment, or create really a kind of school-to-prison pipeline. The type of power models that I certainly saw in our schools resulted in a lack of evenhandedness in terms of who actually got sent to the juvenile justice system. To have a truancy charge against a child who already was in alternative school is a very serious and compounding factor in whether or not that child would get sent off or given

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<sup>85</sup> McKinney-Vento Act of 1987, 42 U.S.C. §11301 (1987).

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other pretty serious impairment to their freedom. That would be the observation. My deepest concern though was the bullying that I observed and the lack of a coherent policy or an enforced policy, if there even was one, inside of schools and the known correlation between that and truancy. There's limitless documentation. I wondered if you might talk a little bit about that issue.

ROBERT SCHWARTZ: You're raising the issue that is now the hot issue in the United States, as states have seen students commit suicide. You know, the Massachusetts case<sup>86</sup> was a catalyst for that. In every school district in the country right now they are trying to address bullying curriculum. But it's going to be a transformation. I think people are seeing the connection but that hasn't yet affected the way schools are responding to the truant part of it. What we are seeing is the introduction of bullying prevention curricula at elementary school levels. The Olweus Bullying Prevention curriculum<sup>87</sup> is in the blueprint for violence prevention models out of the University of Colorado Center on Violence Prevention.<sup>88</sup> So there are some examples that have risen to the top but they're pretty slow to put in. But it's the hot issue in the country now.

DEAN RIVKIN: And as lawyers in this field there is a good anti-bullying statute in Tennessee that imposes certain

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<sup>86</sup> See Rick Hampson, *A "Watershed" Case in School Bullying?*, Apr. 5, 2010, available at [http://www.usatoday.com/news/nation/2010-04-04-bullying\\_N.htm?csp+obnetwork](http://www.usatoday.com/news/nation/2010-04-04-bullying_N.htm?csp+obnetwork).

<sup>87</sup> See Olweus Bullying Prevention Program: Safer, More Positive Schools, available at [http://www.olweus.org/public/bullying\\_prevention\\_program.page](http://www.olweus.org/public/bullying_prevention_program.page).

<sup>88</sup> See Center for the Study and Prevention of Violence: Blueprints for Violence Prevention, available at <http://www.colorado.edu/cspv/blueprints/>.

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requirements on school systems<sup>89</sup> and it's up to us to enforce them in the right cases or to raise those issues.

JESSICA VAN DYKE: I'm Jessica Van Dyke, and I had a question actually for Ms. Dixon, and that is there are a lot of students in here today, young attorneys; can you relate any of your experiences serving as local counsel for a major class action lawsuit? There's a lot of people here that want to get involved, especially in the upcoming years. Do you have any suggestions or lessons learned from that experience?

JACQUELINE DIXON: Wow. Like I said, I really feel like I was just fortunate. I was in the right place at the right time. My former partner, David Raybin, is really well-known as a legal scholar and well-known in the criminal law area. I'm not sure how they got his name, but they contacted him and then he pulled me into it I think because he knew I did a lot of domestic relations and some juvenile court custody kinds of stuff. You know, I wish I knew. I think if you just are aware of what's going on. I think people that do this kind of work are very approachable. Once they got us involved, we sort of sat and brainstormed about other people to be involved. I think if you do a good job in court, you get to know the judges, you maybe become active in a Bar association where you make a lot of contacts with people in different areas of the law, then your name is out there. And don't hesitate to raise your hand or speak up and say, "Hey, I want to be a part of that."

DANIEL ELLIS: Hi. I'm Daniel Ellis from the Anderson County Bar. My question is about business records and the three-day rule. Couldn't the three-day rule for doctor's notes be used to invalidate just a STAR report or something where you've got truancy, they're absent, but you don't

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<sup>89</sup> TENN. CODE ANN. §49-6-1016 (2011).

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have anyone there to testify? Because if the three-day rule says if you don't turn in that doctor's note within three days, you can't turn it in, and if the business records exception to hearsay says that it isn't trustworthy, or if there are circumstances to indicate that it's not trustworthy, then you shouldn't be able to rely on it. So if I have a note, it's four days later, I'm not allowed to turn it in, well, then your business records shouldn't be admissible because your policy makes it not trustworthy.

DEAN RIVKIN: You see what happens when you have the fertile minds of lawyers take on these issues? Terrific.

JESSICA VAN DYKE: At this point we're going to wrap up this panel. They've all been fantastic. Thank you so much for being here today. We have small tokens of our appreciation for each panelist for being here. And I'll just say it's so exciting, every person that's commented has been from a different county in East Tennessee and Middle Tennessee, and it's so fantastic to hear that we have so many different represented counties here today.

(A break was taken)

DEAN RIVKIN: Welcome back, everybody. Austin Kupke, who is a second-year student at the College of Law and a student in our education law practice, got a very coveted internship this summer with the Juvenile Law Center in Philadelphia. I'm going to let Austin introduce Bob for his keynote talk.

AUSTIN KUPKE: Robert Schwartz co-founded Juvenile Law Center in 1975 and has been its executive director since 1982. With over thirty years at Juvenile Law Center, Mr. Schwartz is a national leader in advocating for children's rights and has extensive experience in all areas of juvenile law. In his career at Juvenile Law Center, Mr.

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Schwartz has represented dependent and delinquent children in Pennsylvania's juvenile and appellate courts, brought class action litigation over institutional conditions and probation functions, testified in congress before House and Senate committees, and has spoken in over twenty-five states on matters relating to children and the law. Mr. Schwartz's career has not been limited to Pennsylvania but has included fighting nationally and internationally for juvenile rights. From 1992 to 1998 he was chair of the juvenile justice committee of the American Bar Association's criminal justice section.

ROBERT SCHWARTZ: Why don't you skip some of that.

AUSTIN KUPKE: All right. I'm going to skip to the end. He's very modest also. On behalf Tennessee Journal Law and Policy, we're honored to have him here today. Please join me in welcoming Mr. Schwartz and thanking him for being here.

### **KEYNOTE ADDRESS REVISITING LUZERNE COUNTY: PROMOTING FAIRNESS, TRANSPARENCY AND ACCOUNTABILITY IN JUVENILE COURT**

*Robert Schwartz*

ROBERT SCHWARTZ: Thank you, Austin. Can you hear me back there? Is this on enough? You're okay? Okay. Thank you. If you can't, let me know. Thanks again for sticking around. This is a terrific program. This lunch hour I thought you would be interested in hearing about the judicial corruption scandal that has had the greatest impact in the history of the country that came out of Pennsylvania and in which Juvenile Law Center has been intimately involved. It's certainly affected our lives and changed our perspective on the world in many ways and I think that

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there are aspects of it that have implications for every State system everywhere in the country as folks look to see the fallout of Luzerne County.

Let me just mention just for the students in the room that in 1975 when I helped set up Juvenile Law Center it was with three classmates from law school, we were just out of law school at the time, and had really no clue what we were doing. In talking with a gentleman in the back who mentioned Mark Twain earlier, he also I think said there's no amount you can't accomplish without the right combination of confidence and ignorance. We were both quite confident and quite ignorant when we opened up our practice. We wanted to be public interest lawyers, and one of the reasons was because the Supreme Court in 1967 had decided *In re Gault*,<sup>1</sup> which gave kids for the first time a constitutional status that enabled them to have a right to a lawyer under the Fourteenth Amendment in delinquency proceedings.

At the time there were new rights coming into play in many other areas, the Education For All Handicapped Children Act had just been passed in 1975,<sup>2</sup> the Juvenile Justice and Delinquency Prevention Act in 1974,<sup>3</sup> the Child Abuse Prevention and Treatment Act in 1974,<sup>4</sup> all of these things were just coming in and nobody had worked to implement those laws or to give them content. So we were very, very lucky that, as stupid as we were, we didn't know less than other people and that helped in our ability to set up our practice and become experts ahead of everybody else as this edifice of children's rights was being built over the next few decades.

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<sup>1</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>2</sup> Education for all Handicapped Children Act of 1975, 20 U.S.C. § 1411 (1975).

<sup>3</sup> Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. § 5602 (1974).

<sup>4</sup> Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. § 5101 (1974).

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Our first office actually was a doctor's office in Philadelphia, because we had no money, and a business plan that really wasn't all that effective: that we could change the world one case at a time without paying clients. This was something that we learned pretty quickly wasn't going to last in the long haul. But one of the women in our group was married to a cardiologist who only used his Center City Philadelphia office two mornings a week, so we had it the rest of the time and shared the office with his patients, shared the waiting room actually on Tuesday and Thursday mornings, and made do the rest of the time using the X-Ray machine as a desk and having the only law office in the city with our own EKG and blood pressure equipment. The EKG we could actually pretend with the clients was a lie detector, because when we pulled out the old strips, they really had no idea what we were doing, and neither did we.

But let's take that story over again. We were a retail shop. We represented any client who had any legal interest as long as they were under eighteen, so name changes, child custody. You heard about child custody earlier this morning; we did some of that work early on. I didn't like it very much and we eventually got out of it. Special Ed., school discipline, adoption, delinquency, kids transferred to the adult system in criminal court. There was all the child abuse-related work that was developing at the time. Mental health commitments of kids. It turned out to be too big a field for us, we thought it was going to be too small. And over time we shifted from a Philadelphia-based walk-in center to a national policy shop trying to change the world wholesale rather than retail, and depending primarily on national foundations for our support because we don't have a fee-paying base. We now work and have worked for probably the last decade on working for teenagers. Originally, we were zero to twenty-one. But, again, if you're doing that, early childhood education is a very different world than keeping kids in school at the age of



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fifteen; the legal issues and the rights are different, so we had to keep modifying and changing our identity, geographic focus, and work plan. We worked for teenagers in the justice system and the child welfare system, seeing that they get what they're entitled to in education, health care, mental health services, housing, employment, and education. We try to ensure that kids have opportunities to succeed when they're emerging from those systems, that they're treated fairly by those systems, and that they aren't hurt by those systems which are supposed to be helpful to them.

The Luzerne County story is sort of a trifecta in that regard because it was a story that involved depriving kids of opportunity, inflicting harm, and treating kids unfairly. And it began for us in a serious way four years ago. It was April of 2007, in which a woman named Lorene Transue called about her daughter Hillary who was fifteen years old and was incarcerated in Pennsylvania. Lorene and Hillary Transue lived in Wilkes-Barre, Pennsylvania, a county of about 300,000 – old coal country in Pennsylvania, a Democratic party machine that still was pretty much in power, lots of poverty, lots of loss of jobs when the coal mining industry went away. What we learned I guess was that the major economic driver seemed to be bribes, and that kept the community solvent. But we didn't know that at the time.

What we knew was that Hillary had some months earlier done a MySpace parody of her assistant principal and said at the bottom, "I hope the assistant principal has a sense of humor." I think one of the things Hillary learned is that people don't get to be assistant principals of schools, at least in my experience, because of their sense of humor. So the assistant principal complained, the police filed a petition charging Hillary with harassment based on the parody, and she was called to come to the Luzerne County Juvenile Court for the hearing. She came without a lawyer. And this is a complicated situation that happens often to

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kids: a) she thought it was too trivial to warrant a lawyer; b) that a lawyer might only make the judge mad, and why do you really want a lawyer in that situation; c) lawyers would be expensive to a middle class family. We'll just go down, she'll apologize, get it over with. She arrived at the courthouse building. Outside the courtroom was a probation officer who sat at one of those little desks with the artist pallet kind of desktop that we used to have in elementary school and asked whether she had a lawyer. She said, "No." The probation officer said, "Sign here." And they signed a piece of paper, she and her mother, that turned out to be her agreeing to waive her right to counsel.

She then came into the courthouse which was run by the juvenile court judge who was also the president judge in Luzerne County, a judge named Mark Ciavarella, and she came in front of him and this relates to some of the questions we heard earlier that Dean described – he asked her, "Did you do this?" Now, it was asking a kid to essentially say, "yes" or "no" to a question that encompassed a lot more than yes or no related to guilt or innocence. He didn't ask whether her conduct met the elements of the crime of harassment, it was did you do the MySpace parody. And she said, "Yes." "Do you remember," the judge said, "when I came to your school last year and spoke at an assembly and said that any kid who came in front of me I was going to send away?" And she said, "No." "Well, I didn't go to your school just to hear myself talk." "Shackle her and get her out of here." That was her hearing. It took about ninety seconds. The transcript, such as it is, with really large font is about two-and-a-half, three pages, and that was it.

Lorene, Hillary's mother, collapsed. She didn't get a chance to talk to her daughter, who was indeed shackled and dragged from the courtroom and ended up going to a detention center and then to a placement facility.

Lorene called around and finally reached us. Different people in the State referred her to our office and

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we were attentive for a variety of reasons. Because of the change of our business plan, as I mentioned, we don't take every case that comes our way. We can't do it that way. We generally work within our foundation-funded boundaries. But this case was important for a variety of reasons. One, we were just starting our fortieth anniversary celebration of *In re Gault*,<sup>5</sup> it was 2007, and Gault's case and Hillary's case, for those of you who have read *In re Gault* were identical essentially except for the technology. Gault was a fifteen-year-old who used a land line to call his next-door neighbor to make what the Supreme Court called a joke or a statement of the lewd and irritatingly offensive adolescent variety.<sup>6</sup> He had been sent away for up to six years to an Arizona training center without a lawyer, and had been given no notice of the charges against him, and didn't have a lawyer, and was also asked did you do it, implicating Fifth Amendment issues, under the Fourteenth Amendment at the time.<sup>7</sup> The Supreme Court in '67 said kids are persons within the meaning of the Constitution, the Fourteenth Amendment of which says no person shall be deprived of life, liberty or property without due process of law.<sup>8</sup> So this Court in *Gault* had established constitutional personhood and given procedural protections for what was essentially the same offense that Hillary was adjudicated delinquent on and incarcerated for except she used MySpace for her little and irritatingly stupid adolescent humor. You can see why the assistant principal would have been really irritated and ticked off.

We also were intrigued because we had had a run-in with this judge before. In 1999, we had received a similar call out of Luzerne County for a twelve-year-old boy who had been in and out of psychiatric hospitals most of his life.

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<sup>5</sup> *In re Gault*, 387 U.S. 1.

<sup>6</sup> *Id.* at 4.

<sup>7</sup> *Id.* at 5-7.

<sup>8</sup> *See generally In re Gault*, 387 U.S. 1.

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His mother thought that he may have abused a sibling and she had gone to Child Protective Services just to see what should she do and they sprang into action and had him immediately arrested and brought to court the same day, where an adult came over and said, "This is what we're going to do: you'll plead guilty and the judge will get you help." So it turned out that adult was the prosecutor and the judge found him, this boy, guilty, adjudged delinquent, sent him to the detention center for assessment where over a five-week period he was beaten up and stabbed by other kids, taken off his medications and where they didn't listen to his mother about the psychotropic medication that he should have been receiving. By the time he got to a placement facility, he was so badly bruised that the placement facility filed a child abuse report against the detention center. We did a number of things; one was to bring an appeal around the adjudication, and the other was a lawsuit of the sort that I was mentioning earlier around the failure of the detention center to protect a kid or to have staff trained in mental health issues in a way that made them sufficient and capable of protecting a kid with serious mental health problems. We succeeded in the litigation and we succeeded in the appeal.<sup>9</sup>

What's interesting is, in 2001, when Judge Ciavarella was reversed on appeal in a fairly obvious decision by the State Intermediate Appellate Court, he said, "I will never again try a kid without a lawyer." That was something that we paid attention to, because that was reported in all of the press in Wilkes-Barre in Luzerne County. So, now, six years later, we have a judge who is a recidivist, and that caught our attention. We did some investigation – and I say we, I'm here speaking but it was largely others on the Juvenile Law Center staff; we have

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<sup>9</sup> See generally *J.M.K. v. Luzerne County Juvenile Det. Ctr.*, 372 F.3d 572 (3rd Cir. 2004).

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about ten attorneys who are really first-rate – and interviewed Hillary and brought a writ of habeas corpus, and Judge Ciavarella immediately granted it.

Now, this should have been a signal. You know, for those of you who remember the Sherlock Holmes story *Silver Blaze* about the dog that didn't bark in the nighttime, there are signals, and when a judge immediately reverses himself and grants a writ of habeas corpus for us, that should have been a sign that something was amiss. But Hillary said when we got her out, "I wasn't the only one with a similar situation, there were a lot of other kids like me." We said, "Have them call us and we'll investigate." So she did, and we did. There was the case of the boy who threw a steak at his mother's boyfriend during a domestic dispute and was incarcerated. Now, we thought it must have been like a javelin or something. But, actually, it was a piece of raw meat that he threw at the boyfriend, and in the heat of the domestic quarrel the police were called, and took him in, Ciavarella adjudicated him delinquent without a lawyer, and sent him away. There was the kid who was arrested for conspiracy to shoplift when he was outside a store that his girlfriend took a DVD from; he went away for three months.

These were all first offenders. These are all kids who had never been in trouble. While responses are appropriate if they were in fact delinquent or if they were accused of being delinquent, placement here was never justified and also was done, again, without any process at all, not unlike the truancy hearings that you described earlier today that your students so well described, Dean. We had a kid we call the scooter boy. He was told by a next-door neighbor's kid, "I had a scooter I'll sell to you for sixty bucks." He and his parents went over, saw it, it seemed worth it, and the parents paid the neighbor sixty dollars. It turned out the scooter was hot. Our client was arrested and sent away for what ended up being a couple of years because he didn't adjust well in placement, and his

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failure to adjust and his deterioration over time meant that the judge kept ordering him replaced.

We heard lots of stories like that. We asked our State Juvenile Court Judges' Commission to give us data, because we had aggregate statewide data on waiver of counsel, and we saw that about five percent of the cases in Pennsylvania involved waiver of counsel. In Luzerne County, the rate turned out to be closer to fifty-five percent,<sup>10</sup> all going back several years. This was troubling particularly since starting in October of 2005 we had had a new rule of procedure<sup>11</sup> that not only said that the right to counsel was the kid's alone to waive, but set up an elaborate colloquy process that the court must follow before the kid gave up that right. None of that was followed in Luzerne and they had a waiver of counsel rate of ten times that of any other county in Pennsylvania.<sup>12</sup> We have sixty-seven counties in our state. It also had what turned out to be a placement rate of about two-and-a-half times that of any other county in the state of Pennsylvania.<sup>13</sup>

We sent a team – and I don't know, Austin, whether you'll get a chance to do anything like this – we had some summer law students stake out the courthouse there in Luzerne and we set them up in disguise like with Groucho masks outside the courthouse to interview people when coming out, and to count to see whether there were fewer coming out than went in, to get their stories. By the winter

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<sup>10</sup> Application of Jessica Van Reeth, H.T. & Similarly Situated Youth for Exercise of King's Bench Power or Extraordinary Jurisdiction, Supreme Court of the Commonwealth of Pennsylvania, Exhibit E Affidavit of Linda Bender, Director of Juvenile Justice Information and Technology, Division of the Center for Juvenile Justice Training and Research, Pennsylvania Juvenile Court Judges' Commission at 2, 2008, *available at*

[http://www.jlc.org/files/luzernecounty/JLC\\_Luzerne\\_Application\\_Part\\_2.pdf](http://www.jlc.org/files/luzernecounty/JLC_Luzerne_Application_Part_2.pdf) [hereinafter Exhibit E].

<sup>11</sup> 37 PA. CODE § 152 (2005).

<sup>12</sup> Exhibit E, *supra* note 10, at 2.

<sup>13</sup> *Id.*

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of '07/'08 we had a pretty comprehensive idea of sort of the railroad that was happening in the Luzerne County Juvenile Court as kid after kid was being sent away for fairly trivial offenses, including some that weren't even crimes under our crimes code, like status offenses or things that just didn't rise to a criminal level at all. There was one eleven-year-old who was locked up; had been ordered to make restitution for riding a moped without a license, or to pay a fine, couldn't pay the fine, and ended up spending many months incarcerated. "I'm going to lock you up until you have the money to pay the fine," was what the judge ordered that eleven-year-old, and it was about a 400 dollar fine, which is a mandatory riding a moped without a license fine in Pennsylvania. We had a lot of stories and the trick was what to do about it. We had enough data going back several years, but the time for appeal had long lapsed. Unlike statutes for adults which provide for post-conviction relief along habeas corpus lines, we have nothing in Pennsylvania that provides the collateral relief for juveniles when the time of appeal has expired. So we ended up doing what we always do when we don't know what to do, which is make it up as we go along and used a relatively archaic petition to our State Supreme Court asking it to assert or assume its King's Bench jurisdiction.<sup>14</sup> You can see that this goes back a ways. But it's a pretty powerful authority it has when it does assume King's Bench jurisdiction because it can do almost anything by way of equitable relief that's in the public interest. So we had asked for it to assume jurisdiction, figure out what to do, and provide relief for the hundreds of kids whose rights had been violated by being processed without lawyers in the Luzerne County Court.

We filed our King's Bench petition. We had a couple of really useful allies, because we also thought that

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<sup>14</sup> Juvenile Law Center Petitions PA Supreme Court for Extraordinary Relief for Hundreds of Youth Tried Without the Benefit of Lawyers, available at <http://www.jlc.org/news/luzernecounty/>.

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asking for relief of this sort was as much a political act as a legal act. “At least our Supreme Court,” as Mr. Dooley once said, “pays attention to the election returns.” That’s probably not true here in Tennessee, but we had a Republican Attorney General who is now our Governor as of January. I called and asked whether he would file an amicus on our behalf in the interest of justice, kids were being treated unfairly, and, to his credit, he stepped up and did, and he had a tough re-election campaign that year and he was able to frame it saying I’m not condoning what the kids did, but no kid should be treated unfairly in this way. The State Department of Public Welfare under Democrat Governor Ed Rendell at the time filed an amicus brief on our behalf, too saying that the placement rate was so out of line here; there’s something rotten in Denmark, effectively.

Our court didn’t act very quickly, but we did very, very quickly get a call from the FBI wanting to know what we knew. We said, “What do you know?,” and they said, “We’re the FBI, we don’t tell you what we know, we ask you what you know.” We blinked first and told them what we had discovered and where our investigations had taken us, and we also gave the FBI and the U.S. Attorney for the Middle District of Pennsylvania where Wilkes-Barre is located, near Scranton, a little primer on the juvenile justice system. That summer of 2008 they got a warrant and seized all the juvenile probation records in the juvenile court, so we knew something was up. The press was giving us a lot of very good coverage and we were hearing more and more stories. Our Supreme Court didn’t act at all during 2008.

December of that year we filed a supplemental proceeding<sup>15</sup> because we had had many, many more juvenile cases of kids who had been locked up for trivial offenses, that once Hillary and a few others came forward, other parents felt comfortable stepping up. It was very odd

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<sup>15</sup> Post-Submission Communication, Dec. 2008, [http://www.jlc.org/luzerne\\_state\\_supreme\\_court\\_litigation/](http://www.jlc.org/luzerne_state_supreme_court_litigation/).



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that the parents were ashamed and embarrassed; they had not protected their kids, but nobody had said anything. Now people were beginning to come out of the woodwork. We filed a supplemental proceeding saying even though Judge Ciavarella had stepped down from juvenile court voluntarily that May, which was right after we filed our pleadings, kids were still in placement and still had records, many going back years, and these records were affecting their ability to get into college, enter the military, get jobs; their lives were effectively destroyed in many cases. The Supreme Court in the second week of January of 2009 with a one sentence per curiam order denied our application for King's Bench jurisdiction. We didn't know why. We thought we had lined up things pretty powerfully, but we hadn't at least adequately made the case in their view.

Two weeks later the U.S. Attorney from the Middle District held a press conference and announced that two bills of information had been filed alleging that Judge Ciavarella and the former president judge, Judge Conahan, had received at that time 2.6 million dollars from the contractor, builder, and owner of the for-profit detention center to which many of these kids were being sent. Not only were these judges engaged in wire fraud and tax evasion, but they were part of a larger conspiracy to keep the beds filled in return for the payments, and that part of what was going on as the subtext for our work was a large corrupt bartering that had led to the way the judge behaved.

Now, of course, all hell broke loose in the state. We were aware that there was a new detention center. It turns out that Judges Conahan and Ciavarella used that as an opportunity to convince the County commissioners to enter into a twenty-year, fifty-eight million dollar lease with the for-profit entity that was building the new facility, after our earlier litigation over the abuses at the former detention center. What we also learned at the time, although it turned out that there was no connection, was one of the two primary owners of the for-profit facility was the son of a

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former Chief Justice on the Pennsylvania Supreme Court. So we thought that there were connections there, and it turned out that there's been no evidence to connect him at all with this enterprise.

But everything was still unfolding at the time in early 2009. The Supreme Court immediately reversed itself and granted our petition. They did it two steps. First, they granted our petition by press release, which was the quickest way to let the world know that it would eventually grant it officially through court order.<sup>16</sup> By mid-February of 2009, it had assumed jurisdiction under its King's Bench authority and appointed a special master, a wonderful senior judge from Reading, Pennsylvania named Arthur Grim who is also head of our Juvenile Court Judges' Commission and was a very, very good jurist. What we really have here is a Kids-For-Cash Scandal with what I think of as four different story lines. One is what happened in State court related to the King's Bench jurisdiction and the Supreme Court's exercise of it. Two is the federal criminal indictments. Three is a federal civil litigation that's going on. And four are the legislative and rule-making regulatory responses in the wake of that. So I want to take each of those in sequence. First, as soon as the U.S. attorney acted, we filed yet another amended King's Bench application.<sup>17</sup> We knew we had a receptive audience at this time. Even though it was untimely because we were now three days past the fourteen day time limit, we were well able to file a *nunc pro tunc* application asking for the Court to treat it as though it were timely filed. There was no way in the world they were going to dismiss this for being untimely at this point because they had gotten a lot of bad

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<sup>16</sup> PA Supreme Court Order: Feb. 11, 2009, *available at* [http://www.jlc.org/luzerne\\_state\\_supreme\\_court\\_litigation/](http://www.jlc.org/luzerne_state_supreme_court_litigation/).

<sup>17</sup> JLC Application for Reconsideration to the PA Supreme Court, Jan. 29, 2009, *available at* [http://www.jlc.org/pages/luzerne\\_state\\_supreme\\_court\\_litigation/](http://www.jlc.org/pages/luzerne_state_supreme_court_litigation/).

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press for not acting on the original petitions. We spent the next year litigating what was effectively 6,500 cases of 4,500 kids going back to 2000 when Judge Ciavarella became administrative judge. We argued that all of these kids had appeared before a biased tribunal, many of them without counsel, and that under Pennsylvania case law 100 percent of the cases were tainted. The district attorney fought to a degree. The original strategy of the defense – and this was what we think of as the obscenity of this whole situation – is that the DA's office opposed our original motions saying we only named a few named plaintiffs and that therefore we hadn't shown that this scandal was wide and deep; this was from an office that had a representative in the courtroom in every case for every kid because they were prosecuting it. They changed that actually after the indictments came down and there was sequences of cases that we had to deal with, the kids who were all sent to the for-profit facility without, in some cases, lawyers were one category, and then there were other more serious cases. But eventually, by January of last year, on the one-year anniversary of the King's Bench petition being accepted, the Court accepted all of the special master's recommendations and ordered that all the delinquency adjudications be vacated back to 2003 and all of the records be expunged for all those kids. We got that done without a single case being retried. That was a particularly important step as part of the healing in Luzerne.

Needless to say, there were also a lot of mental health interventions and support from the Mental Health Association in Pennsylvania. Frankly, there were also interventions needed for original victims, because out of those cases there were cases of kids who had hurt other people or stolen or done things that required intervention, and, in fact, the legislature last year created a fund for the original victims' original crime for restitution purposes. But the first thing was to get records expunged, and that's

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turned out to be a lot harder and slower than we thought because we wanted the records wherever they were to be erased, and it wasn't just finding the court records or the State police records; we also had to track kids to wherever they were. The collateral rippling effects of these orders are still having an effect because some kids who were subsequently arrested as adults who had their sentences enhanced by juvenile record scores had to have recalibration of their offenses.

There have been many other situations that have had to be resolved, and we were too late for some kids. One of the kids committed suicide last month in a horrible situation; some of you may have seen his mother on TV after the Ciavarella verdict on the criminal side. So this is still a case that is having its impact.

We also filed in February of '09 a federal civil rights damage action with pro bono counsel from a Philadelphia law firm Hangle, Aronchick, Segal & Pudlin. The Segal is a board member and brought the resources of his firm to bear. There were many other lawsuits coming out of Luzerne, some for private damage action on behalf of individuals and at least one other class action. We couldn't get a lot of help, actually, from people while we were investigating up there, but as soon as the scandal broke, there were bus ads for lawyers and TV ads breaking out. The case is going on. We filed damage actions against the judges' wives who were part of the money laundering scheme because they set up the accounts, and the judges got very rich, as did the owner, a former County solicitor, who was the primary briber. They had condos in Florida, bought a yacht called Reel Justice, R-E-E-L, I guess for their fishing, and they made out quite handsomely.

The judges' wives are out from motions to dismiss. The judges are in and out. As you know, judges have absolute immunity for conduct taken while on the bench. We thought we could pierce that immunity by arguing essentially that what they ran was a star chamber, it wasn't

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a bench, the kind that we would recognize, and that in fact corrupt conduct over a five-year period in 6,500 cases was not the kind of conduct that the judicial immunity doctrine was designed to protect. We had many former judges sign on as amici to us, but the District Court judge rejected that, absolute immunity is absolute immunity. The judges are still in for their conduct as administrators, including their work in getting the detention center built and getting the contract in place and some of their other administrative conduct. We can't appeal that until after the case ends. I'm not sure how much it's worth. The judges will not have money left by the time this case is over. While it turns out that they are representing themselves on the civil side – I guess once again demonstrating their appreciation for the value of lawyers and replicating something that happened in their court with kids – they are paying a lot of money to be represented on the criminal side. There are lots of fines against them as well. They're not going to have very much, so this is largely a theoretical issue about judicial immunity.

The County is the other defendant that was able to drop out. We tried to create a *Monell v. Department of Social Services of the City of New York*.<sup>18</sup> I think it's a circumstance that the State and County policies around training affected the way that the County prosecutors behaved and that that failure was in part a cause of what happened in Luzerne, but the federal judge decided that the prosecutors were, for purposes of this litigation, State employees, not County employees, and that we couldn't bring the County in.

All the other defendants are in, all our causes of action are in, including civil RICO<sup>19</sup> claims, as well as

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<sup>18</sup> *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658 (1978).

<sup>19</sup> Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1964 (1995).

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claims against the defendants for depriving the kids of an impartial tribunal in a number of other ways.

All of this, by the way, all the pleadings and the stories behind this are on our Web site at [jlc.org](http://jlc.org), and it does make, I think, for pretty interesting reading; terrifying reading at the same time.

The judges in their initial guilty pleas had agreed to accept eighty-seven months in federal prison. Then they started squirming. Judge Ciavarella basically was pronouncing his innocence constantly and couldn't stop talking to TV cameras. Judge Conahan was constantly evasive in his negotiations with the federal probation department. The result was that the federal judge rejected the guilty pleas and gave the defendant judges the usual options: "You could come before me on an open plea and I'll decide your sentence or you can withdraw the guilty pleas." The two judges at the time decided to withdraw the guilty pleas. Judge Conahan reconsidered and pleaded guilty last summer to one count of the many charges against him, one RICO claim or wire fraud claim, I forget which, that would expose him to up to twenty years in jail. And Judge Ciavarella insisted on going to trial, and his trial took place in February. It was a very interesting proceeding, partly because of the choices the U.S. attorneys made. I thought of this as something of an Al Capone-like trial in the sense that they really focused on tax fraud, wire fraud, and other kinds of fiscal evasions, and put on very little evidence around kids for cash.

Ciavarella, I think, had wanted exactly that kind of prosecution, because he had been saying all along that basically, "Yeah, I broke the law but I didn't lock any kid up for cash." I think he had convinced himself that he wasn't that bad of a person and went to trial in a "don't throw me in the briar patch" approach that the U.S. attorneys bought into. They tried the case that played to Ciavarella's interests in claiming as he did after he was convicted, on only twelve of the thirty-nine counts that

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were brought against him, that he was vindicated. He's facing about 150 years. He went before the cameras afterwards to claim that the jury verdict, which acquitted him of some of the extortion and bribery charges but not of the tax charges to which he so readily admitted while on the stand, was a vindication of him. That's what led the mother of the boy who committed suicide to explode on camera at the time that Ciavarella was holding his press briefing after his conviction, and I think may yet not serve him very well when it comes time for the federal court to sentence him sometime later in the year. Ironically, he has now replicated the exact conduct that led the federal judge to reject his first guilty plea. One wonders exactly what he and his lawyers' strategy is now for sentencing when he has been telling the judge that you were wrong the first time when you rejected my eighty-seven-month plea.

So, we have the King's Bench piece. We have the federal civil damage action. We have the federal criminal actions. And then we have a "what do you do to prevent something like this from ever happening again?" I actually am fairly proud of Pennsylvania's juvenile justice system as a whole. We've done a lot of very good things. All public systems are imperfect, some more or less so, as you know in the child welfare side from what you've heard earlier today, and the Pennsylvania system is generally judge-based – judges retain control of all cases in our system from beginning to end exactly like they do in child welfare cases. There's no state system or youth authority to which kids get placed. Kids have a right to counsel at every stage of the proceeding in dependency and delinquency proceedings. It's a very community-based system as a whole, a lot of private nonprofit resources rather than training schools. But Luzerne was a stain on the state in a way that had everybody do more than just lift eyebrows. In

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2009 the legislature created an Interbranch Commission<sup>20</sup> to investigate and to make recommendations. They did a tremendous job. It was an eleven-person commission that included some D.A.s, judges, defenders, and citizen advocates. They took testimony; some of it was chilling. The District Attorney said, “What is a person to do?” and the head of the commission, a real gentleman, a senior judge named John Cleland just exploded and said, “You report what you see, that's what a person is to do. When you're a D.A. responsible for ensuring that justice is done in the courtroom!” The judges were silent in thousands of cases; defense attorneys were nowhere. The public defender in the county was perfectly willing, when his attorneys came to him and said, “You know we have some problems,” to say, “It's not our cases.” Seeing kids dragged off day after day. “Not our cases.” “We have a big enough case load.” Now, this is a public defender who resigned last year because it turned out that he too had billed the County for overtime and weekend work that as a manager he wasn't entitled to bill for. But he also never really paid much attention to juvenile court, neither did the D.A. for that matter; it was a court that was out of sight and out of mind as far as they were concerned, and Judge Ciavarella was known as a person who didn't brook lawyers very much or very well anyway. Private lawyers said nothing; they saw what was happening. Juvenile probation said nothing, even though they were asked to alter the court documents to show that they had ordered detention when in fact they had recommended community release. There was a whole community conspiracy of silence in that courtroom. I don't know if you remember “A Bad Day at Black Rock” with Spencer Tracy – it's probably before your time maybe – but

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<sup>20</sup> The Unified Judicial System of Pennsylvania, The Interbranch Commission on Juvenile Justice, <http://www.courts.state.pa.us/Links/Public/InterbranchCommissionJuvenileJustice.htm>.



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you should watch it, it's a good movie, where Robert Ryan goes down at the end. Communities of silence do a lot of harm. And our legal community failed kids enormously by not standing up. That was one of the chief findings: that everybody failed. The judicial conduct board in our state had received reports and complaints that it didn't act on because it had heard that there was a criminal investigation going on; "We can't get involved in judicial misconduct, we'd rather let the judges stay on the bench than interfere with a potential criminal prosecution." Unheard of anywhere else in the world, but our guys let it happen. It's very hard to change given the way our Judicial Conduct Board is embedded in our State Constitution.<sup>21</sup>

There were many other problems that the Interbranch Commission found. We submitted a lengthy report that is also on our Web site<sup>22</sup> – the title of my talk today is the title of our report, so it's easily found – in which we talk about the importance of counsel for kids and other things. At the end of the day the Interbranch Commission made numerous recommendations, about forty of them related to judicial training and training of lawyers. We think training is important but doesn't go nearly far enough. We asked for a number of things, for example a ban on shackling of kids in courtrooms unless there's necessity based on evidence related to risk of flight or injury to others. We have 300-pound murder defendants in adult court who aren't shackled when they're brought into court; you protect the courtroom in other ways. Yet the twelve-year-old mentally ill kid, eighty pounds of him, is under wraps and metal. There's no excuse for treating kids that way. The issue of a right to counsel is another example. We recommended, and have been arguing fairly

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<sup>21</sup> See *generally* Penn. Const. art. 5, § 18.

<sup>22</sup> Lessons from Luzerne County: Promoting Fairness, Transparency and Accountability,  
[http://www.jlc.org/files/Juvenile\\_Law\\_Center\\_Report.pdf](http://www.jlc.org/files/Juvenile_Law_Center_Report.pdf).

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fiercely now, that not only do kids have a right to counsel but they ought not to have a right to waive counsel in juvenile court. It's the right from which all other rights flow or are exercised. Kids are not informed enough. There's a lot of pressure on them, including pressure from parents not to pay for counsel or not to risk offending a judge. You want lawyers who are at times offending judges, who are making the cases for kids, who are putting in evidence. That now is an issue of rule-making by our State Supreme Court.<sup>23</sup> We will get, I think, a presumption that every kid in court is indigent, so appointing a counsel will not depend on whether parents can pay.

We needed to set up an appellate system. We have no appeals. As we had talked about on the child welfare side, it's essentially a lawless system. But it's not only Pennsylvania. There are very few appeals in delinquency cases anywhere in the country. Issues like disposition, whether this was the right intervention given this kid at this time with these facts. We occasionally see appeals of the adjudication based on "well it really wasn't aggravated assault, it was simple assault." But you never see appeals for "this kid should not have been sent to the training school." Also, you need a quick appeal process. Even a ninety-day process would not have helped most of the kids that we represented in Luzerne. The beauty of Ciavarella's work is that he sentenced almost all these kids to ninety days at a time. They'd be out and their appeals would be moot for the most part by the time they acted.

We want easier ways to get records expunged in the State. We've made recommendations on that. We've talked about opening up juvenile court in appropriate

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<sup>23</sup> In the summer of 2011, the Supreme Court of Pennsylvania adopted many of Juvenile Law Center's recommendations. *See generally* New PA Rules Require Juvenile Courts to Address Needs of Youth in Child Welfare, Juvenile Justice Systems, [http://www.jlc.org/news/new\\_pa\\_rules\\_require\\_juvenile\\_courts\\_to\\_address\\_needs\\_of\\_youth/](http://www.jlc.org/news/new_pa_rules_require_juvenile_courts_to_address_needs_of_youth/).

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circumstances. It is really a court that has no public presence. It's our fault as well. The press has had the right to go into juvenile courts in Pennsylvania in serious cases since 1996, but nobody shows up. It's a court that has really been overlooked and abandoned by too many people in too many places.

We have a series of recommendations. The legislature has been slow to act. This spring, finally, we have bills being introduced related to shackling, related to waiver of counsel, presumption of indigence, expungement, and we're beginning to make headway. We're working on all four fronts with Luzerne. The first one on records and expungement is almost done. The litigation may end in my lifetime, I'm not sure. We still have to get through the discovery and trial phases, as it looks like the civil case will not be settled. And the judges have yet to be sentenced, so await word on that this year. The legislative reforms are still coming, but many of them are reforms that everyone anywhere in the country should consider. Let me pause there and take questions on the things that I have omitted, left out, or maybe you think I exaggerated.

UNIDENTIFIED SPEAKER: I'm very glad that you came down today and discussed this with us, because when I heard you were from Pennsylvania, the first thing that entered my mind was how people in Pennsylvania felt about that. But I've noticed, being an attorney here in Tennessee, we're not without sin either, as I'm representing an adult in Tennessee, I can go over to the adult detention facility, I can basically walk through the place without being harassed, be treated very respectfully by everybody there. When I see my client, I can go into a room, have a private conversation with him, stay as long as I like, and, as I said, be treated respectfully the entire time. I took on a case of a juvenile that was an appeal and I went to Mountainview and I went to see my fourteen-year-old client over there. What impressed me was that the security

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was tighter there than it was at the adult prison where I was representing some hardened criminals. When I went to converse with my client, it was in a large room and, by the way, I was told that I could only come to see him on Saturdays between a certain time. I went to talk to him and asked to have some alone time with him, because there was a huge room where everybody, parents and everybody, was visiting. I had a chair that I had to sit in and he had to sit beside of me and we had to face forward and there were folks all around us that could hear every word we were saying. When I got up and sort of moved our chair over to the corner of the room –

ROBERT SCHWARTZ: That got their attention, didn't it?

UNIDENTIFIED SPEAKER: – I was threatened. I was threatened with arrest. There were about four guards that came over to me, they didn't touch me, they didn't grab me, but boy they sure as hell let me know that they were there and that I was to comply with their rules. And I got sort of into an argument with them over the fact that I was there on business, I wasn't visiting my kid. In representing that juvenile that turned out to be the most frustrating event of my life, because I've never seen a place where children, and attorneys for that matter, were treated with such disrespect. The way that they acted is “this kid is here, he's going to stay here.” When I finally got my appeal before the Circuit Court judge, it was a pretty brief appeal. The judge asked me how my client was doing being there in that detention facility. And I was proud to say, “Oh, he's doing great.” And he said, “Well good, let him stay there, case dismissed.” And when I stood there sort of stammering, again I was told, “Hey this case is over, get out of here.”

ROBERT SCHWARTZ: Yeah. I think what you're describing is the power relationship that exists in the juvenile court world. I've had similar experiences with my

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first visits to see kids in placement. And I didn't get a lot of help from judges. I remember once very smugly saying to the staff at the facility, "All right, you don't want me to see my client alone here? Let's just call the emergency judge." I was sure that any judge would order me to be able to see my kid immediately. This is like never asking a question you don't know the answer to on cross. The emergency judge said, "What's the problem? Can't you work it out? No, I'm not going to order them to do things." It took a lot of work for me to get a culture change where lawyers could go in places in Pennsylvania and see their clients and talk to them alone. Many of these places make up their rules as they go along, and that, again, contributes to the lawlessness of our world. There are a lot of great judges, there are a lot of great lawyers, there are a lot of decisions that are correct; that's true in every aspect of our law. There are also a lot of abuses of power and incorrect decisions. And people ask me, "Can Luzerne happen elsewhere or is it happening elsewhere in Pennsylvania?" It's not that the bribes are happening; it's that there are cases in which some judges act arbitrarily without anybody challenging them. There are places where kids are sent where lawyers like you can't speak to them. We have an obligation to step up, because we're the last line of defense and we're all the kids have quite often.

UNIDENTIFIED SPEAKER: I've got a question for you, please, about whether, due to the sheer number of cases involving trauma to kids that you guys heard, there was any secondary trauma that you observed in yourselves?

ROBERT SCHWARTZ: That's a good question. I don't think so. I mean, when you do this work, you see a lot, and I think we were constantly appalled. What we saw fueled our anger and passion and we don't like to lose, for one. And, two, we were determined not to let go. I was very proud of our staff. They were like little terriers on the heels

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of these judges and they wouldn't let go. We just got angrier and angrier and more focused. Once the FBI stuff broke, all of a sudden we had a lot of backing and I don't think we had any secondary trauma. I think we felt some kind of vindication. Whatever the opposite of trauma is then, that's what we had.

COLLEEN STEELE: Following up on that, what about marriage rate and divorce rate in that area? A very hard thing for a marriage to sustain is having a child who is incarcerated for a length of time. Marriages will fall apart as a result of that kind of stressor I would think.

ROBERT SCHWARTZ: That's a great question, and I don't know the answer. It's something we should probably look into. I think it's an important part of the story line. And, actually, there are people writing things about this that we could ask to look into it. A guy is writing a book. We should say do a chapter on that.

UNIDENTIFIED SPEAKER: Regarding expungements, are you referring here to expungements on individual delinquency matters or at the beginning of the eighteenth year of the child?

ROBERT SCHWARTZ: We were talking about in individual delinquency matters. Generally, the public has a view that is incorrect in almost every state, that when a kid turns eighteen, records disappear. In fact, as we know, records don't disappear unless somebody makes them disappear. In most cases, records are correctly kept. Serious offenses, you want know that this was a serious offender, and it's important to have a record. But for many minor offenses, including a lot of arrests that have never led to an adjudication, those end up really dogging kids for life. The American Bar Association has a collateral consequences

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project now<sup>24</sup> that is looking at a fifty state review of the way juvenile adjudications affect kids' lives from getting into college, to drivers' licenses, to employment practices, to almost everything, and expungement is one way to get relief, but lawyers are needed in most cases to do that because there's almost no automatic expungement for kids.

JESSICA VAN DYKE: Thank you so much. Please join me in thanking him. At this point we are going to take a break.

(A break was taken)

JESSICA VAN DYKE: Before we start panel three, I wanted to very briefly mention that we started planning this symposium last October/November, over Christmas vacation. There have been many people who have been incredibly helpful, including all the Journal members and Jeff, who does all of the technical stuff that I could never even begin to do. So, a lot of work has been done, and we're thankful for all of those people. Also, when you signed up for CLE credit, you signed up with Micki Fox. Micki makes the world go round here at the College of Law. We had over 100 attorneys that ended up signing up and showing up today, and that's a huge amount of work for one person. Her assistant, Kaitlyn, is also incredibly helpful, so we're just so thankful for her.

Corinna Brock is Professor White's assistant and works for the Center for Advocacy and Dispute Resolution. And finally, we have Professor White, who was actually named the Outstanding Professor of the Year this year by her students. She's a real role model for all of us and really strives to achieve justice and help out the College of Law.

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<sup>24</sup> Think Before You Plea: Juvenile Collateral Consequences in the United States, <http://www.beforeyouplea.com/>.

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So please thank all these people. They've been tremendous in putting today together.

JOHN EVANS: I'd certainly like to echo everything Jessica said, and I'd like to recognize her because she put in countless hours, especially this week, and I owe her that. I think we've done an excellent job of covering the legal aspects of protecting children, but as you notice, the title of this symposium is "The Politics of Protecting Children," and one very important aspect of that is the political field. So, we want to have one panel dedicated to some of those issues in public budgeting and political aspects. So, we put together what I believe is a wonderful panel to talk about legal and ethical responsibilities of protecting children in a political-type frame. With us on this panel is Representative Sherry Jones. She's in the Tennessee General Assembly representing District 59. We have Connie Steere, who is an executive director for CASA in Kingsport. And we have Mary Walker, who works with Big Brothers and Big Sisters of Middle Tennessee, and she was former general counsel for the Department of Children's Services. So I'll turn it over to them. Thank you all so much for being here.

### **PANEL DISCUSSION 3: CONFRONTING POLITICAL AND ECONOMIC CHALLENGES**

*Representative Sherry Jones*  
*Connie Steere*  
*Mary Walker*

CONNIE STEERE: The three of us have already discussed that we don't know if we can sit there that long. I know I can't. Anybody that knows me knows I'm a little hyper, so I'm standing. I prepared a few slides just to give you an idea of what CASA is, rather than me just talking. So if you



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will, just concentrate and speed read. (Whereupon a slideshow was shown).

(Title of first slide) “Indispensable for Justice.” Our Bar associations work very closely with us. We’re stabilizing instead of moving up. There are more quotes from guardians ad litem coming up so please read them. Here is why I believe the CASA programs are effective. Notice from left to right, we’re having to do a whole lot more fund raising to try to meet the need. One of our judges, a Bristol judge, has a quote at the bottom. Here’s one of our programs serving Sullivan and Hawkins, but there’s twenty-five programs across the state of Tennessee serving forty-two counties, not ninety-five, and this is where I am right now.

With the topic that John Evans sent me, these are a few things I’d like to go over. I’m mostly going to talk about CASA because I’ve been the executive director of CASA for Kids in Sullivan and Hawkins Counties for the past fifteen years. I took the job after coming off residential for over 1,000 teenagers, so I do know about children and youth in state custody. I really thought that the CASA Program, with what we do, serving abused and neglected children and getting concerned citizens to want to help – and because I can make connections, I can talk to businesses, and I knew the judges already so we were welcome in the courtroom – I’d only need about three to five years, and we could be serving 100 percent of those children. As hard as we’ve worked, we’re only still at forty-seven percent, and that’s probably one of the highest percentages across the United States, well not the United States, but in Tennessee because some state CASA programs are 100 percent funded. However, you’ll be surprised to hear me say that I don’t want to see 100 percent funding. I really don’t. Because we’re a nonprofit of concerned citizens, and we need the whole community, every county in every state in the union, to care about children, all children, whether they’re your own children or

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not. Because if we don't, we all lose. The first day of the month of April is Child Abuse Prevention and Awareness Month, so that's why I wanted to come. I thought April, and so I'm here. And as a legal body, a political body, we're all involved in this whether we want to be or not or whether we know it or not.

(Title of next slide) "Ethical CASA Confronts Protecting Children in the Courtroom." These are some points in ethics that will depend on the beholder. I looked at the role of being a volunteer because that's what we are in the CASA programs. We're volunteers, except for the staff that we manage to hire like my host there, Amy Williams, who used to be on my staff and is now in your College of Law here at UT. They're volunteers that advocate for the best interest of abused and neglected children in juvenile court. One of the ethical problems is that you are only a volunteer. We like to point out that our judges, the five that we work with in Sullivan and Hawkins Counties, are not just my special advocates, they've gone through over fifty hours of professional training, and I just swore them in as officers of the court. I want to hear what they have to say because they're moms and dads, brothers and sisters, nieces and nephews, business people, teachers, and nurses that care about kids. I want to hear what they have to say because they've done investigations, and they are only there for the best interest of the child.

Another area you could call ethics, maybe as far as the law, is confidential reports. Sometimes we are told that our confidential reports to the court, which sometimes can be thirty to forty pages long by the time we get all the medical records, criminal records, employment records and everything else to go along with our assessment and recommendation, are full of hearsay. I'm not going to deny that. It is hearsay, but it's reliable hearsay according to Judges Toohey, Luethke, Lauderback, Kennedy and Taylor. It's reliable because I just swore them in as officers of the court, and I trust that they have done their homework and

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investigated well. And if not, it's up to executive directors like myself to make sure that you've got a good, educated, nonbiased, hard-working volunteer.

(Title of next slide) "Right of Discovery, Ethical." Every attorney in that hearing has the right of discovery. That is tough sometimes for volunteers to accept, but it's the right of anybody who has counsel. However, we do want the attorneys, the court and judges, and all parties to realize that sometimes that right of discovery can compromise the safety of the child as they go back home. Also, as far as continuances, I think that can be an ethical problem in regards to children brought to the attention of the court due to allegations of abuse and neglect. The child's sense of time is now. They need protection now. They need their circumstances improved now. Continuances are continued and continued and continued, and that thirty-day hearing becomes much, much longer than before the adjudication and the disposition. That's what we, as advocates, are not pleased about and are disappointed for the child.

The next one (motioning to next slide). As part of the legal community, I believe a guardian ad litem attorney should be on every hearing, every single one. With CASA and a guardian ad litem attorney working together, we can help and present a lot of information to the judge. But CASA cannot legally question or legally present the case. At the same time, if you quickly read those quotes, you will see our guardian ad litem attorneys, who we have worked closely with for a long time, say right up front that we can't do all that you do, and our judges say the same thing. Attorneys don't have the time, and especially at the payment base of what guardian ad litem attorneys make in juvenile court, they do not always want to take the time because they're not going to get reimbursed a whole lot. Also, they can take other cases instead. So, I read up a little

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bit on that, and with that and D&N,<sup>1</sup> and also with custody and 40A,<sup>2</sup> every one of the custody cases that we work in Sullivan and Hawkins Counties are allegations of neglect, and sometimes they're more complicated and take longer to really ensure the child's safety than your full D&N cases. That's just the reality of how the petitions come in, whether they're relatives or they're already removed from the home and in the custody of Children's Services. So at the same time, a guardian ad litem in custody cases needs to be able to act as an attorney and really present the case, and right now, my understanding of 40A<sup>3</sup> is that it isn't really a part of it.

Now for a couple of illustrations of guardians ad litem and CASA working together. About a month-and-a-half ago now, I came in on a Sunday afternoon – I work quite a bit on the weekends just to get all the grants and fund raising and everything done – and there was our newest guardian ad litem, who had been appointed to a lot of our cases in Kingsport, the CASA volunteer, and one of my volunteer coordinator staff sitting at the conference table on the program suite side and working away on a case. I left, and five hours later, they were still there wanting to adequately prepare the defense of an in the best interest of the child case that they were appointed to as a special advocate and as a guardian ad litem attorney.

Another one was one of the vignettes that turned in to IOLTA<sup>4</sup> with the Tennessee Bar Foundation that we have a grant with. A lot of the CASA programs also have IOLTA grants on the Interest on Legal Trust Account in Tennessee. One of my coordinators on the vignette reported how a guardian ad litem attorney had taken a private plane. I meant to ask before I left yesterday and didn't, whether it

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<sup>1</sup> Dependency and Neglect.

<sup>2</sup> TENN. SUP. CT. R. 40A.

<sup>3</sup> *Id.*

<sup>4</sup> Interest on Legal Trust Accounts.

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was his own or if it was a friend's, but he took, as a guardian ad litem attorney, another coordinator on staff and the CASA volunteer and flew to Charleston, West Virginia to guarantee that the relative placement or custody was going to be in a safe and permanent home and could adequately report that to the court. It was all on their own. He didn't bill it. He can afford it. The other illustration was the first one regarding our newest guardian ad litem. It was the one about a Sunday afternoon at CASA for Kids headquarters. She's just out of law school, and we already discussed among staff that she probably won't do it much more than another year or so, because financially she's got big debt from law school. But we needed her, and when I say we, I mean abused and neglected children coming to the attention of juvenile court.

(Title of next slide) "Political challenges." Well, the State budget is one, and CASA's affiliation sometimes gets lost in that State budget. Right now, we are under the control of TCCY, that's Tennessee Commission on Children and Youth, and we're happy and proud to be there. Linda O'Neal is a great champion. However, amongst the budget of TCCY, CASA is just where it is. It is DCS-money that's channeled through. However, if I was over at DCS, I certainly would want most of, or a high majority of, that money going to DCS, not to CASA. In some states, CASA is a line item on the budget for research. Again, I really don't want it to be, and it would be nice if it was enhanced a little bit more than it is. Instead of forty-two counties, it could be all ninety-five, but I don't want it to be because you can get a grassroots movement in each community with CASA, a nonprofit.

Election changes are always a challenge because when election changes come, administrations change, policies change, and procedures change, and for DCS, some of their practices change. All of that change is sometimes good. However, sometimes it just kind of revolves, and if you've been in the business of social

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services long enough, such as way back when the Department of Human Services and the Department of Children's Services was all one, you know.

Well, then we separated, and we had ACCT, Accredited Care and Coordination Teams. Then we went to DCS, and then we went back. Each time, it is challenging. It is challenging to keep up with the politics of it. With legislative changes in family law, you go from grandparents, who have no rights in visitation and custody, to grandparents certainly having rights, but only if it's in the best interest. However, then you have to figure out whether it is in the best interest of the child. Is it allegiance to the mom and dad, or is it to the grandchild? So laws change according to what the legislature constitutes as best. For example, right now there is a custody change bill involving termination of parental rights: the presumption that returning an abused or neglected child to the custody of abusive and neglectful parents is not necessarily in the child's best interest.<sup>5</sup> Right, Sherry?

SHERRY JONES: That's absolutely right.

CONNIE STEERE: I'm sure you're going to talk about that.

SHERRY JONES: I have that –

CONNIE STEERE: Yes. Oversight on children's issues. Again, there was a Select Committee on Children and Youth, but now that's changed. Now it's the Tennessee Commission on Children and Youth and the Judiciary Committee maybe, but maybe not, and so we're waiting to see exactly who has the oversight of children's issues in Tennessee. When we come to children's advocacy days—and I hope that expands beyond just the Tennessee Commission on Children and Youth, that's kind of a hope—

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<sup>5</sup> H.B. 1332, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011).

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the more and more I hope it's guardians ad litem. I hope DCS maybe even gets off for that day because it's a great service continuing education for all of us, and also judges. One of our representatives in the Northeast Tennessee area said, "You know, if you really want to expand CASA," – and, by the way, we do—"why don't you get all the judges to come too?" Good point. Good point. So all of us going together, I think, make a stronger advocacy.

Then there are DCS cuts, and the *Brian A.* lawsuit compliance, and that's good, but in my opinion some of it's bad. Yes, we don't want 12,000 children in foster care like we did in 2001.<sup>6</sup> And, yes, it sounds good that now we only have 7,000 in Tennessee.<sup>7</sup> So abuse and neglect must have suddenly gone down. It has not. And a month ago, well maybe two months ago, in the paper we were third in the nation for meth labs; we're now first.<sup>8</sup> And as far as prescription drug abuse, you haven't given me enough time to talk about that. We're number four in the nation for infant deaths from abuse and neglect.<sup>9</sup>

So maybe some of those cases—where there wasn't a guardian ad litem like there used to be until they became

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<sup>6</sup> TENNESSEE COMM'N ON CHILDREN AND YOUTH, THE ADVOCATE: STATE CUSTODY ISSUE, Sept. 2000, *available at* <http://www.tennessee.gov/tccy/adv0009.pdf>; *see also* TENNESSEE COMM'N ON CHILDREN AND YOUTH, THE ADVOCATE: CHILDREN IN STATE CUSTODY ISSUE, May, 2004, *available at* <http://www.state.tn.us/tccy/adv0405.pdf>.

<sup>7</sup> TENNESSEE COMM'N ON CHILDREN AND YOUTH, ANNUAL REPORT 2011 at 25, Apr. 15, 2011, *available at* <http://www.tn.gov/tccy/MAP-rpt11.pdf>.

<sup>8</sup> Jim Salter, *Tennessee Overtakes Missouri in Meth Lab Seizures, Busts*, CHATTANOOGA TIMES FREE PRESS, March 2, 2011, *available at* <http://www.timesfreepress.com/news/2011/mar/02/tennessee-overtakes-missouri-meth-lab-seizures-bus/>.

<sup>9</sup> Beth Warren, *Tennessee Ranked Fourth in Child-abuse Deaths*, MEMPHIS COMMERCIAL APPEAL, Dec. 14, 2010, *available at* <http://www.commercialappeal.com/news/2010/dec/14/tennessee-ranked-fourth-child-abuse-deaths/>.

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delinquent, and now they are there for dependency and neglect but maybe not getting paid what an attorney would normally be paid—could have been caught earlier and maybe not ended up in death. DCS needs help. I'm not here to criticize the system. I'm here to say, and I thoroughly believe it, that the system belongs to every one of us. Every single citizen can help to make it better.

The economic challenge, in relation to being effective, is just the state of the economy right now. And with CASA, we have \$15,000 per county. Ron Ramsey, my friend and your Lieutenant Governor, likes to say in groups—at least in our area he does—that we give CASA a little seed money and it's one of the government programs we can help and they can do a whole bunch. Well, just think if that little seed money was a little bit more than \$15,000 per county. We could double what we can do and maybe get closer to 100 percent of the cases having a Court-Appointed Special Advocate to go along with guardians ad litem.

I'm going to skip a little bit down here and maybe some other things will come up. In your package you see the Pew Commission and Recommendations on Safeguarding Children's Best Interest in Dependency.<sup>10</sup> It came out in 2005 and some of that has already taken place. Some of it is still being worked on as far as how we can help children and maintain their best interest in juvenile court. AOC, the Administration of Courts, has really expanded training for judges in courtrooms and everything. National CASA, which we're a part of, has 1,055 programs across the United States and has received some money nationally, but it trickles down in grants. So when it says

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<sup>10</sup> THE PEW COMM'N ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE, *available at* <http://pewfostercare.org/research/docs/FinalExecSum.pdf> [hereinafter Pew Report].



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that one of the things you can do to help children is to expand the Court-Appointed Special Advocate program,<sup>11</sup> we'd like to see that in Tennessee, expanded and increased.

And why? The Pew Commission and the Office of Juvenile Justice and Delinquency Prevention of the U.S. Justice Department say fifty-three percent of abused and neglected children, if circumstances are not improved, become juvenile delinquents.<sup>12</sup> The kids I saw in residential for five-and-a-half years, the ones that got the most attention, were the delinquent. And you don't think those kids in the system, when they would run from residential and so forth, knew they'd get attention. We need to get them in the beginning when we can prevent child abuse and neglect. Of those fifty-three percent that become our juvenile delinquents, according to William Nidiffer, President of Turning Point Experience, each one costs the State of Tennessee approximately \$75,000.<sup>13</sup> I've been saying \$54,000 because that's the latest I could pull from the budget from Tennessee Commission on Children and Youth.<sup>14</sup> It is now \$75,000. That's your tax-paying money, and it's a child who may very well have lost not only their childhood but their productivity as a citizen and all that they can be also. Then, beyond delinquency, we're paying because thirty-eight percent of our delinquents nationwide end up in our prisons, with a federal average cost of \$39,000 per child a year. So my whole point economically is the UT College of Law can start right now with forgiving

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<sup>11</sup> *Id.* at 20-21.

<sup>12</sup> OFFICE ON CHILD ABUSE AND NEGLECT, et al., A COORDINATED RESPONSE TO CHILD ABUSE AND NEGLECT: THE FOUNDATION FOR PRACTICE, Ch. 6, *available at* <http://www.childwelfare.gov/pubs/usermanuals/foundation/foundationf.cfm#back onezerofour>.

<sup>13</sup> Information contained in email correspondence between panelist and William Nidiffer from July 27, 2011.

<sup>14</sup> TENNESSEE COMM'N CHILDREN AND YOUTH, 2009-2010 ANNUAL REPORT, at 7, *available at* <http://www.tennessee.gov/tccy/ar2010.pdf>.

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loans of students that are willing to go into juvenile court and defend these kids. If they stay one year and they do a good job, one year waived; two years, two years waived; three years, all waived – and maybe then you can afford to join us as CASAs and stand up for these children effectively so judges have fact-based objective information.

And we're cost effective. The U.S. Justice Department says CASA returns forty times in investment<sup>15</sup> – forty times – because if you saw one of those slides, how many billions we have lost when we lose a child that could be coming back to UT going to law school. So for CASAs and guardian ad litem attorneys to be able through legislation to better collaborate together to best represent the dependent and neglected child in juvenile court, to assist judges in administering justice, that would be one of the most ethical and economically wise investments from our Tennessee legislature and system for the future health and welfare of Tennessee. Every child deserves a safe and permanent home, not only deserves, but needs. The sooner the better for Tennessee. Thank you.

SHERRY JONES: Hi. I'm Sherry Jones. I am a State representative out of Nashville, Tennessee. I have been a State representative for about seventeen years now and was a metro council member for eight years before that. I am a mother. I am a grandmother. I have three grandchildren and a new one coming in July. My niche has kind of become children in the General Assembly. I'm for working people and working people's issues. I'm all about that, and health care, but children's issues have really become the thing that I do and that I am really, really passionate about. The first thing I'd like to say is that I believe it's really hard to protect children. Children aren't really considered people with rights; at least that's the way I've come to see it

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<sup>15</sup> U.S. DEP'T OF JUSTICE, A TRIBUTE TO COURT-APPOINTED SPECIAL ADVOCATE (CASA) VOLUNTEERS, ANNUAL REPORT 2003-2004.

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through all of my years of dealing with the systems. If I came up and decided that I was going to slap John around, John would have me arrested, and I would be arrested and I'd wind up in court and I'd wind up with a serious problem. But you can beat up your kids and you can beat them up over and over again and the kid still goes back to that parent.

We had, and I get, cases called in to me from all over the state, and DCS has told me for the last several years that I am their best friend because I help them in their funding. But I am their worst enemy too, because when they do something wrong, when they're not doing things right, I point it out to them, and I don't have a problem doing that. We had a gentleman who came to my office who had two of his grandchildren living with him. His daughter and her husband were both on drugs, and they both were involved in an instance, actually two, where their four-month-old went to Vanderbilt Hospital and had two severe head traumas. Well, the little boy has lifetime disabilities now, mental disabilities. DCS took custody away from the parents and gave it to the grandparents. The grandparents have been raising the children. At about, I don't know, a year or so after the grandparents had had them, the father decided that he wanted the child, both children. So he goes back and he does what DCS always tells them to do. Mary was at DCS, so Mary knows, and I was a CASA volunteer, I know about CASA too – but DCS goes in and says, well even though both parents are on probation, the father wants the kids back, so we're going to do what we always do – we're going to send that child's parent to anger management, we're going to send that child's parent to a parenting class, and we're going to have that parent pass a few pee tests, and then we're going to give that so-called parent back these children. And that father has those children now. The grandparents are devastated because they are scared to death that something is going to happen to those kids. And from the things that

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I've seen, I believe that that's true, that something will happen to those kids.

I have been on a Select Committee<sup>16</sup> for probably fourteen years or so, and have been Vice-Chair and Chair of the Select Committee. I've been on Children and Family<sup>17</sup> for about ten years now and have chaired there, and have been Vice-Chair also. And I see these instances all the time. The only way that we, as legislators, can get help when we bring these pieces of legislation to correct these issues is for you to help us. The first thing you can do is tell us what's going on – what terrible things, what good things are happening, let us know. If you've got cases like I just talked about, let me know about that. I passed a law<sup>18</sup> two or three years ago that allows us, as legislators, to look at some of these cases that are being worked when there's some sort of problem going on with them. And we have found that by doing that, it makes DCS a little more accountable to us with what they're doing, and they have to do a little bit better. I haven't found that DCS is the world's best at interviewing children when they've been abused, severely abused, or sexually abused. So the CACs have stepped in and they've been doing a lot of those interviews now. They do about eighty percent of those, and they are the people that are specifically trained to interview children who have been through these terrible traumas. So what I'm trying to do this year by legislation is mandate that all forensic interviews are done by the CACs, everything is in the same line, everybody has got the same training, and they're good at it.<sup>19</sup>

DCS isn't too cool with that, though. The new commissioner<sup>20</sup> – and Connie spoke about new

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<sup>16</sup> Joint Select Committee on Children and Youth, which is made up of members of various committees of the Tennessee House and Senate.

<sup>17</sup> The House Committee on Children and Family Affairs.

<sup>18</sup> TENN. CODE ANN. § 37-5-107(d)(1) (2011).

<sup>19</sup> See H. B. 1318, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011).

<sup>20</sup> Kathryn O'Day.

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commissioners – the new commissioner wants to do her own thing, she wants to make the decision, she wants to do it on a case by case. And the liaisons that came down – I said she wants to do every one of these – she wants to determine herself for every one of these, what they're going to do. Yes, she does. On a 24/7 basis – yes, that's what she wants. I said, “Okay, nice to see you and I'll see you all around the halls.” I try my best to bring legislation that I honestly believe helps makes children's lives better, that protects them; that provides services. While we've been doing some studies<sup>21</sup> on the Select Committee and we've done a lot of things that we've passed and things that we're finishing up, the multiple response we've done. Last year, I passed a transitioning piece of legislature<sup>22</sup> to help kids who age out of foster care be able to have a little more time with services to help them get into schools, to help them get into work, to help them find a place to live and to get transportation, so we're still working on that. DCS has really kind of dropped the ball on it. We should have had a lot of kids in that program by now, and we don't have near what we need to. With the Select Committee, we've tried to save DCS from being cut, some of their programs from being cut, because there are too many cuts to children's issues now.

There are severe cuts to mental health issues now. So if you're dealing with mental health, that's almost worse. We helped save the Coordinated School Health Plan. I passed restraint and seclusion.<sup>23</sup> One of the early speakers addressed where kids with mental health issues have rights

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<sup>21</sup> See, e.g., Public Chapter 1023: Human Sex Trafficking of Children, <http://secondlifechattanooga.org/wp-content/uploads/Public-Chapter-1023-March-2011.pdf>.

<sup>22</sup> 2010 Tenn. Pub. Acts 1065, Tennessee's Transitioning Youth Empowerment Act of 2010, codified at TENN. CODE ANN. §37-2-417 (2011).

<sup>23</sup> 2011 Tenn. Pub. Acts 457, amending TENN. CODE ANN. § 49-10-1301 (2011).

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and we treat them appropriately. We'll probably go back and amend that a little bit this year. We've done a mental health study where we're trying to figure out: How do we first see that a child needs mental health services? And then when we think we've seen that, what do we do? How quickly can we move to get those issues addressed, to get the assessment, to get the services that we need that hopefully will help that kid do better in their lives and have their problems addressed a lot sooner? We passed a resource mapping piece of legislation,<sup>24</sup> and with that we're looking across the state, and we're still working on that – I think we have one report out now but we're not through with it – to see what services are out there, who has services, who doesn't have services, and how we can kind of help even things out across the state and be sure that all children have access to services and to people that are responsible to help them.

Like Connie said a minute ago, *Brian A.*<sup>25</sup> was kind of a hit for us. You know, we don't like to lose in the State, but we did, and we deserved to. When the last commissioner, Viola Miller, was hired she was hired basically as the *Brian A.* attorney, and her job was to get us out from under that *Brian A.* lawsuit. So what she did was come in and tell staff, "Don't take any more kids. We don't want any more kids in State custody." Now, the Select Committee on Children and Youth, we meet across the state. We meet with providers, we meet with DCS workers, and we meet with public. We meet with anybody who wants us to come, who has an issue, and we try to sort through things and come up with what we can do to help. I have an 8 1/2 x 11 sheet in my office with names of DCS

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<sup>24</sup> 2008 Tenn. Pub. Acts 1197, amending scattered sections of Titles 4 and 37 relative to resource mapping of funds used to support children; see also 2005 Tenn. Pub. Acts 391, amending scattered sections of Title 37 and repealing part of TENN. CODE ANN. § 37-1-407 relative to child protective services reform.

<sup>25</sup> *Brian A. v. Bredesen*, 149 F. Supp. 2d 941 (M.D. Tenn. 2000).

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workers, front and back, who are dying to testify to things that have gone on in DCS. The *Brian A.* settlement and the commissioner not taking children into custody did nothing but hurt children across this state. We left children in homes where they continued to be abused and continued to be neglected because we were trying to keep our numbers down, and there is nothing in the world right about that. I don't care if our numbers doubled. If you need to take them in, if you need to save a child, you need to save that child, and it's not about the numbers.

My legislation this year that has the CACs do all the forensics<sup>26</sup> will maybe bring more kids into custody, who knows, but it's the right thing to do, and we need to do what's right by these children because in a lot of cases they don't have anybody. We're it. If you're their attorney, you're it. We've had Magistrate Judge Carlton Lewis, who is one of the most respected, knowledgeable judges that we have in Nashville in juvenile court, who knows juvenile law. But we have a lot of judges that don't know across the state. They don't have a clue. We have judges that hear domestic violence cases, and they don't have a clue what the law is. We, as the General Assembly, cannot mandate training to them. I would like to see any judge who deals in children's issues go back every single year and be updated on the law and how that affects them. I want them to be studying that all the time. I don't want them to give their personal opinion. I want them to give the opinion of the law. I want them to do what's right for these kids. We have judges in domestic violence cases who don't know the law and don't understand mental health. They don't have a clue about it. They send kids back to places where they're going to be hurt. Women go back to places where they're going to be hurt. But I can't mandate that training. I've tried to, but I can't mandate that training.

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<sup>26</sup> H.B. 1318, *supra* note 19.

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When you see that there is a piece of legislation up that you think is important, that you think is either really, really bad or really, really good, you can help. Every one of you can help. You call your representative, you call your senator, and you say, "This piece of legislation is really good. I'm an attorney, I deal with this, and I do that, and this is really going to help us, and I live in your district, and I'm a voter in your district, and I hope that you'll vote for this." Don't be too threatening. We get real annoyed about that. But you do need to let us know that you live in the district. And a lot of times people call up and say, "Oh, this is Barry Sullivan and I live in your district." I say, "Where do you live?" because I know the streets in my district. "Well, I live on Torbay Drive." "Oh, yeah, Barry, how are you doing?" And if they say, "Oh I live on 16th Avenue South," I say, "Oh, okay, Barry, what can I do for you?" because Barry doesn't live in my district, and I know he doesn't. Now, I might be interested in what he has to say, depending on where he's coming from, but he's not as important to me as that guy that lives over there on Torbay Drive. And that's what all of you guys need to remember, whomever is your representative and your senator and you can influence, you just need to do it because you can help us a lot.

For those of you dealing with child abuse cases, too, the 800 number,<sup>27</sup> and I don't know where you all have seen it, but we're not real crazy about it where I am. Because if the three of us call and report child abuse on one kid that we saw in a parking lot where the parent grabbed them and slung them up against the car and they fell down and the parent kicked them, they will take one of our calls, but the other two they'll throw out. And I think they need to keep every single call. Anybody who wants to leave their name, they need to write it down so they know that a lot of people are seeing that and they will step up and do

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<sup>27</sup> Central Intake Child Abuse Hotline, 1-877-237-0004.



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something sooner, because a lot of times they don't. I had a grandmother who came to me who said, "You know, my two granddaughters are being abused. Their mother chokes them, she kicks them when they are on the floor, she calls them filthy names and says they're useless and they can't do anything." DCS wouldn't go out and even see about that, and it took us two years to even get them to go out and see about it. And when they did, do you know what they did to the mother? Thirty days anger management. That's what they all get. And then she's off and she's back beating up the girls again. And the grandmother has called and said there's no need to call DCS because they're not going to help. She said the girls won't tell them anything else because it just causes them more trouble. So here we are, in a place where we want to help and we can't help because we're screening out too many things that we shouldn't screen out. If I could have it my way – and I can't, but if I could – I would have every call to the 800 number investigated, because I think we miss so much and we allow so many children to be hurt. We allow too many children to die because of the way we handle these issues. I would like to see you all really think about how you can help and be sure that you call that 800 number with reports. I've called it. When I get cases in my office where DCS isn't going out to investigate, I'll call something in from my office. And they'll say, "Well, do you want to leave your name?" And I say absolutely so. And hopefully that makes a difference. It doesn't always.

But, you know, these are important issues. We've had cases, in Memphis in particular, we had a lot of issues with – try not to be too offended – judges and guardians ad litem, where the judge has a certain group of guardians that they use. Those are the ones that they use for everything. They're all a group of friends, and they all go out to eat and they hang together. That doesn't give you fairness in how you're handling these cases with the kids. You've got to be doing what's best for the child. You can't be doing

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something because your friend thinks that it's the right thing for you to do. Politics is really, really a tough business, and you have to get kind of tough skin or you'll be in tears half of the time.

This year we are doing a lot of things that are not going to be good for the people of this state, and I don't know that we can stop it, but I hope at some point that we can go back and fix those things, because not everybody understands children's issues. Not everybody in the General Assembly understands that, it's not their thing. You know, transportation may be their thing. Conservation or farming may be their thing. And they don't understand how these things impact children and how you impact the families and how you lose productive citizens, and you wind up spending more because of jail or mental health issues. And I try to lobby as many of them as I can on the issues coming around, but it would really help if you all would do the same and spend some time knowing who those folks are and letting them know what you think. Since you're in the field, since you know what's going on, let us know. I'm happy to hear from you anytime, and anything you have that you think I might need to know. We were talking about legislative changes. I'm for those. Anybody have any great ideas, I'm all about them. If you're working with a case where you see that we are absolutely not doing what we're supposed to do and you see a way we can fix it, let me know and we'll try to do that. I've done that for a lot of people.

We had Josh Osborne back some years ago, and – I don't know if you all read about him in the paper – he was a fourteen-year-old boy, he had some physical disabilities, but his father and his stepmother had chained him to the bed. They didn't feed him; they didn't let him up. He was no bigger than this (gesturing with hands) at the time that he was removed from the home. DCS had been there, and they had investigated and said everything was okay. He had siblings who were being sexually abused. And Josh almost

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died before there was help for him and his siblings. And we passed a piece of legislation for him a couple of years ago,<sup>28</sup> and we have another small piece<sup>29</sup> that we're passing for him now. He comes to me all the time and he'll say, "I've got something else, I've got something else." He's about twenty years old now. He's not like this anymore (gesturing with hands); they're feeding him now, but he's had some heart problems, and he's on dialysis quite a bit now. But he's a really good kid and he doesn't want to see any other kids hurt like he and his siblings were, so we're going back and we're trying to do as much as we can for Josh to help him feel better and help protect children in this state too.

Money is a serious problem, and we can't do anything without money. You know, that's just the bottom line. So I'm going to challenge all of you all today, go out and find one thing that says, "Made in America" and buy it. The more things you can buy that say "Made in America," the more we're going to get out of it. It creates jobs, and what you're spending in tax dollars helps us fund these programs, because we are cutting them like crazy. I appreciate so much what this organization does for children and the issues that you bring. We're hoping that some of you all will come to Nashville at some point, maybe during the summer or fall, and we'll have some sort of little symposium and discuss some things that we need to discuss and bring some legislators. You all are great. I'm glad that all of you were here today. I hope you've learned something. I've learned some things myself, and I've heard a lot of things said during the meeting earlier that I've heard plenty of. So thank you all so much for letting me come

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<sup>28</sup> 2008 Tenn. Pub. Acts. 1024, amending TENN. CODE ANN. § 39-15-401 relative to child abuse and neglect.

<sup>29</sup> 2011 Tenn. Pub. Acts 313, amending TENN. CODE ANN. §§ 39-15-401-402 relative to contact with victims.

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today. And, please, if you have anything that you think I need to know about, I'm right over here. Thank you.

MARY WALKER: I think there are some advantages and disadvantages to being last. Let me say I graduated from UT School of Law in 1979, and I'm so delighted to be back. I participated at the clinic and loved working with Jerry Black in the neglect/dependent clinic at that time. And since then – I sort of feel like I have a target on my back – I was DCS general counsel for five years. I negotiated *Brian A*<sup>30</sup> along with some folks from the attorney general's office. I still think it's a good settlement agreement. When we got sued, there are some things that you do, and I think we came up with a settlement agreement that, if implemented, would be a very good answer to some of the problems in the State. I challenge you, if you have not been to the DCS Web site,<sup>31</sup> read the settlement agreement,<sup>32</sup> read the reports – at least the executive summaries for the technical advisory committee.<sup>33</sup> I want to add one thing. I was talking to Ann Barker, we worked together at DCS – there are some advantages, as all of our panelists said, to bringing either a class action lawsuit, bringing individual lawsuits like Dean and his students were talking about, or bringing specific issue litigation. How many law students are here right now? We have a pretty good number. I hope you will not feel discouraged by some of our comments today. I hope you will feel encouraged that there is much more to be done. And also over the years we've made a lot of progress in the child welfare system. When I started

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<sup>30</sup> *Brian A.*, 149 F. Supp. 2d 941.

<sup>31</sup> <http://www.tn.gov/youth/>.

<sup>32</sup> 2008 MODIFIED SETTLEMENT AGREEMENT, *Brian A. v. Bredesen*, No. 3-00-0445, available at <http://www.childrensrights.org/wp-content/uploads/2008/10/ex-e-small-file-size.pdf>.

<sup>33</sup> TAC MONITORING REPORT, Dec. 15, 2008, available at <http://www.tn.gov/youth/dcsguide/fedinitiatives/TAC%20Monitoring%20Report%2012.15.08.pdf>.

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representing children and parents, most juvenile court judges did not recognize a right to counsel, they didn't recognize that in a termination of parental rights of course a parent has to have a lawyer. There was very little training for juvenile judges. There is a lot more now. There could still be more.

The Department's case loads are at least cut down to twenty, and they were eighty to 100 before. When I came to law school, I had been a child welfare worker for ten years, so I was kind of the old woman of the class. Penny White and I played football together on the law school team. We believed in sports rather than political issues. It turns out, we all believe in political issues; we just needed a little time.

I say all that to say you have so many opportunities in front of you. I feel like because you're here, you are interested in children's issues, and we need you to be involved; we need you to be lawyers at the juvenile court. We need really good lawyers at juvenile court. We need lawyers who know how to file motions and do discovery, and who believe that the Rules of Procedure apply in juvenile court. Who when lawyers and judges don't follow the Rules, you report it—you don't sit back and watch it and say, “Oh that's okay, I can't do anything.” When you see a judge duct tape a kid in a hearing, you report it. You act on what you know is wrong. And it still happens. Some of you are in counties where some things happen to kids and parents that should not happen. I just had to put in a word of encouragement. You have to be brave. You have to speak up. You have to file with the judicial counsel. And on DCS issues, I was there five years to hire fifty lawyers. They went from fifteen lawyers across the state to sixty-five. We hired them and trained them. We still have sixty-five to seventy DCS lawyers for ninety-five counties. I know the five years that we were there, they improved tremendously; they had training, they were able to handle their case loads. It was an exciting time. I think they've

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continued to keep those positions. I don't know what you think in terms of their quality of practice. But if it's not what it should be, file your motions, get it before the court. Take an appeal. Don't just accept it.

I'm supposed to be talking about Big Brothers Big Sisters and prevention programs. You've heard a lot of information about intervention. When a child is already in the court, they're there on allegations of dependency or neglect, delinquency, or trancies. There are programs that deal with prevention – you know a lot of them – Boys and Girls Club of America, Big Brothers Big Sisters, the YMCA, the YWCA, lots and lots of programs in your community. There are not enough, but there are programs that you can put your clients in touch with. You've heard an awful lot about children who are already in the court. The CASA director Connie Steere did a great job of talking about what she could do with more money, and I support that completely. You know, if there are more CASAs, if there are more people challenging what's happening in the courtroom, then that's a good thing. But let's think a little bit about how we can keep those children from going into the courtroom in the first place. The topic of our discussion is the politics of protecting children. When you look at what I put in your notebook you may think, “Well, what's she talking about.” I included the Pew Commission report,<sup>34</sup> which you should all read. It's five years old, but it absolutely holds true. If you want to go on the website,<sup>35</sup> it's all there. It's a wonderful study that talks about foster care, judges, lawyers, what should be happening, and resources. So look at that, look at *Brian A.*,<sup>36</sup> and figure out what you can argue to be sure your client gets the services that she's entitled to. Every child is entitled to enough food, good schools, an opportunity to learn, and parents who take

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<sup>34</sup> Pew Report, *supra* note 10.

<sup>35</sup> *Id.*

<sup>36</sup> *Brian A.*, 149 F.Supp.2d 941.

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care of them, parents who love them. Not all of our children have that. They should all have the opportunity to succeed in school and in life. And if they don't, what can you do about it?

Let's talk a little bit about nonprofits and organizations that are really impacted by politics and funding. I want to give you one example. Big Brothers Big Sisters provides one-to-one mentoring, and we ask that a volunteer from the community commit herself for at least one year to a child and to spend six to eight hours a month with that child. Our average match length in Middle Tennessee is twenty-two months. So those volunteers who commit to a year actually are staying longer. We ask them to stay involved with their child through graduation, to be involved with this child forever, whether they want to continue to be involved with the agency or not. We have gone from serving 500 children to 3,000 children in the last five years. Now, how did we do that? We got some federal funding from President George W. Bush, who believes in mentoring, and who said if we're going to divert children from the juvenile justice system, from going into the court and then going on to be detained or confined, we need to start much earlier. So he allocated forty-three million dollars to serve children of prisoners, and he picked children of prisoners because all the information that was given to him and to that administration indicated that if there is not an intervention for a child who has a parent in prison, seven out of ten of those children will follow their parent to prison. Now, the first time I heard that, I thought that could not be right.

There's a statewide coalition of Big Brothers Big Sisters agencies, and we're the administrator for that. As we developed the Children of Prisoners Program in Middle Tennessee and across the state, we have over the last five years served over 4,000 children in a one-to-one mentoring situation, and we're really proud of that. All children of prisoners, 4,000 plus children, who we feel will have a

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better shot of not following their parents to prison and of being successful. So about a month ago we got word from the House of Representatives that HR1,<sup>37</sup> the appropriations bill, was passed and sent to the Senate. The Children of Prisoners Program is gutted, completely gone, if the Senate passes that appropriations bill. It's about seventy million dollars total that was cut: a tiny, tiny part of the federal budget. Also cut was Teach for America, AmeriCorps, senior citizen programs that do mentoring, and a huge list of domestic programs. I don't know what your politics are and don't want to even address that, but I want you to know what's being cut in the appropriations bills that are going through – a lot of domestic programs that involve volunteers, which doesn't make a lot of sense to me. You have all this free labor. You have AmeriCorps workers who are paid practically nothing to work in the communities of poverty and with kids. You have Teach for America that's proven to have done a wonderful job in inner-city schools. You have Big Brothers Big Sisters that has existed for over a hundred years and has a pre-/post-test, research-based, evidence-based program that is very, very successful. So how do politics affect nonprofits? Tremendously.

Now, we can go back to serving our 500 children. We can raise enough money for 500 children. Our services cost is a \$1,000 per child, per year. That pays for the professional staff that does the interviewing, the assessing, the coaching, and all the things that go with a quality mentoring program. But we can't raise \$2,600,000 in Middle Tennessee very quickly. I don't think we can do it at all. I think the community is willing to give. I agree with you, Connie, that you don't want to ever give up your community involvement and investment. But to go to scale and to really try to offer this program to as many high-risk

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<sup>37</sup>Full-Year Continuing Appropriations Act, H.R. 1 112th, Cong. (2011), *available at* <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.1>.



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kids as we have, there has to be State or Federal support. If Bill Gates wants to come in and he wants to do one-to-one mentoring all over the country, or fund CASA programs all over the country, that would be great. But short of that, I think you have to look at the reality of where you want your tax dollars to go. Do you want them to support quality programs? You should demand quality programs. You should ask questions; you should know what the outcomes are. If Big Brothers Big Sisters in another part of the state doesn't have twenty-two to twenty-four-month retention rates for their matches, you should ask how much money they should get. If you have a grassroots mentoring agency that is very well-intended, but just doesn't have the resources to make those quality matches, you should ask some questions about that.

What I'm saying is that politics and funding have a huge impact on the kids that you're interested in. We serve only high-risk kids. We serve kids from single-parent families who attend Title I schools,<sup>38</sup> or are children of prisoners, and the reason we kept it so narrow is we don't have enough volunteers and we don't have enough funding. It's not that every child doesn't need a mentor. I think most of you can remember the mentors you have or had. And you need three to five mentors for a child to really have a good chance of succeeding. We want to just give one good quality mentor to that high-risk child who has a parent in prison or a parent who is unable to parent completely. The parent can be a partner with a volunteer, but they may have a mental health issue, they may have an issue regarding their own employment, or they may work three jobs to keep

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<sup>38</sup>Title One schools were established "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments." *See* 20 U.S.C. § 6301 (1965).

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themselves in housing, and so that extra help from a qualified volunteer who is committed to their child may push that child to be successful. We're not a nonprofit. We're a social profit. We are an organization that gives the community better schools, safer communities, and successful adults, because we intervene with that child in a preventative way.

Representative Sherry Jones says we don't have any money and they're cutting right and left, both in the Federal and the State governments. What do we do? It's a hard situation. We have huge deficits, but I think that to throw away those programs that significantly impact our most vulnerable children is not what we want to do. You should treat every child the way you want your child to be treated. They should have the kind of lawyers that you would hire for your child. They should have the services that you have for your child. They should have the teachers that care about them. They should have the administrators who don't look at five, eight, or ten absences and make a decision that they're going to expel, suspend, or refer them to the juvenile court; instead they're going to try to figure out how to help this child.

I want to stop so you all have time to ask some questions. I urge you to educate yourselves so you can make the best argument you can make in court. Someone was asking me earlier what the difference was between "indicated" and "validated," and I thought, "I need to go back and try to figure that out." But I said, "Look at the policy, look at the statute, and make your best argument. Think about what is it you're trying to show, what you're trying to prove, and then make your best argument."

Let me say one thing. I was thinking, Representative Jones, about your comments. I was at DCS a short time. I was also a juvenile court referee in Davidson County for about eight years, hearing all the neglect and abuse cases. So I feel like I've come from a lot of different perspectives. The child welfare system is a tough, tough

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system in which to figure out how we can make meaningful and lasting change. I think everybody knows that. I think what you need to do, what I ask you to do, is educate yourselves, go down and talk to the commissioner. I'm sure Representative Jones will talk to Commissioner Kathryn O'Day, or Commissioner O'Day will talk to Representative Jones, about how we can work out this difference on forensic interviewing. You know, forensic interviewing makes sense. If it's the issue of money, let's talk about that, but educate yourselves. Don't presume that you know all the answers. I guess I also want to put a pitch in for the young lawyers that are coming out. Go into this area. There is huge room for change. You can make a real difference. If your judge is not any good, run for judge. Speak respectfully of the DCS workers if you can. Speak respectfully about what you're trying to do in the community and then move forward with that. Make an investment and maybe we'll make it a little different place for the kids that we're trying to help.

JESSICA VAN DYKE: I'm Jessica Van Dyke. Something that struck me especially during your panel, but also on other panels today, is that the problem seems to be bad parenting or a lack of knowledge about parenting. And I know Representative Jones mentioned the parenting classes several times. Are there parenting classes or programs that you could recommend to the attorneys here today? It seems like if that's a root cause of the problem, we also need to direct our attentions toward that area. What can we do in that respect?

SHERRY JONES: I think you need to start directing your attention early to those children that are going to be having children, because you just can't do a thirty-day parenting class and get it all. You just can't; especially when somebody has been so abusive, thirty days of parenting just is not going to work. It never works. They need to be

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learning patience and love as they go. If you're going to have a baby early, oh my God, you're not going to get to go to the movie with your friends. I want everybody to have one of those little toy babies that cries all night. When you're in the ninth or tenth grade, I want you taking one of those babies home for six weeks or something and seeing what that's like, because it is stressful and you need to be able to be patient and handle those things. That's just not something that thirty days teaches somebody. I know that the Exchange Club does some parenting classes too. People are trying to help parents be better parents, but they've got to want to be better parents. If they weren't parented well and they think that's okay, they're not going to try, and it's just not going to work for them. They've got to want it and then go for it. It's just like a drug and alcohol abuse program. You've got to want it. So you need to start early.

MARY WALKER: There are some resources in different communities. I know in Nashville and I think several others, Nurses for Newborns,<sup>39</sup> for example, starts when the baby is born. They go home with the mom. They don't live there, but they visit very, very regularly and are involved for a long time. It used to be in the old days that the public health department did that. That was part of the charge to the county health department. They were involved with helping moms learn how to breast feed, learn how to discipline. Because of politics, the pendulum swung back the other way and there was a lot of privatization. Now, at least most urban areas in Tennessee have really good resource manuals that list everything. The other thing is, when you go to court to advocate, if you reach an agreement, on disposition don't just leave it up to the judge to order a thirty-day parenting class. Instead say, "I have found a program that I would like for you to enter into the order," if your parents agreed to that. I think in juvenile

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<sup>39</sup> Nurses for Newborns Foundation, <http://www.nfnf.org/>.

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court you're part social worker and you're part lawyer. Regardless of which role you're playing, whether you're the parent's lawyer, the child's lawyer, or the GAL, you really have to know your resources. Sometimes DCS workers do; sometimes they don't. Sometimes the foster care review board or the citizens' members know some of the resources. If there are not some out there, we started a renewal house in Nashville because there was no long-term treatment for moms addicted to crack cocaine. You have in Knoxville the one we modeled after, Great Start, which is a wonderful program. So, again, the challenge is: Do you really want to be involved in developing community resources and how to do that? I hope you will.

CONNIE STEERE: I'd just like to say also that with parenting classes, lots of times all that is required, unless there is real check up on it, is attendance. Attending a class does not make a good parent. What you're looking for is an improvement as far as good practice, behavior modification, and getting your act together as a parent. A part of what we feel is important in CASA is that you're also the watchdog, not only facilitating the services, but checking and reporting back to the court on that progress. Not just the attendance certificate that goes into the court file. The second part is that, unfortunately, if you did not receive good parenting, because most behavior is learned behavior, you repeat it. Again, the early intervention, prevention, mentoring, and facilitation of services that really do work and help are what that child needs. A foster parent told me that her five-year-old foster child told her that she was going to grow up to be a pimp. Now, Amy and Naomi, we know that's not that surprising. Kids think, "I'm going to make it. I'm going to make it." They're only fifteen or seventeen and they're in the eighth grade or the ninth grade, but if there aren't services that are going to make that child really have a chance of making it, then selling drugs, selling themselves, or someone else is how

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they're going to make it. Now, that's the parenting and that's the learned behavior if that's what you've observed. So we need to intervene and help prevent those circumstances so they can grow up and know how to be a good parent in the first place, and that's when it doesn't cost so much money. If you're trying to rescue, unfortunately, it's sometimes just too late.

BARBARA DYER: I'm Barbara Dyer. I'm from Johnson City, but I'm an adjunct here at the law school. I just want to add onto this discussion that I think that it's a deeper subject. I think that until we, as a society, decide that children are our greatest resources, and until we decide that we're going to invest in them and in families and make it possible for people to make a good living, I would add onto the fact that children only do as they learn. If they have had the possibilities of going to a good public school, and if they have had the benefit of having parents who have good jobs and who have financial support, then they're going to end up in a lot better situation. I think that we as a group and as a society have to decide that that's an important thing and invest in it.

SHERRY JONES: Sometimes it's just a little bit of help that they need just to get over the hump and move forward. There are a lot of excellent social workers out there that truly, truly care about the kids and the families who they're helping. Sometimes it's policy from the top that prevents that, but there are a lot of good people out there who do want to help. As far as public schools, No Child Left Behind<sup>40</sup> fixed it so that nobody can make a good grade anymore. My kids teach. My son is an administrator. You can be a failing school by a tenth-of-a-point because your special-ed missed by a tenth-of-a-point in attendance. You might have a non-English speaking class that misses math

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<sup>40</sup> No Child Left Behind Act of 2001, 20 U.S.C. 6301 *et seq.* (2001).

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by a tenth-of-a-point. Everything else can be okay, but you can still fail. That's not right. Public schools are much, much better than what people give them credit for, and we're making a big mistake in this state treating teachers the way we are.

JOHN EVANS: I have a question. Given that our system is becoming more and more partisan all the time, there are very limited resources, and our legislative bodies are being used on sometimes not substantive issues but more political issues, how do we ensure that children, one, get the attention they deserve, and, two, get the public budgeting that they need?

CONNIE STEERE: Probably having more of these types of symposiums and bringing your business people and those foundation funders. You read that Pew Commission report,<sup>41</sup> and with the Race to the Top,<sup>42</sup> Tennessee has a lot more federal money coming in for education. What a great foundation endowment it would be if it funded things like young lawyers having tuition waived for going into juvenile court, as well as things like Big Brothers Big Sisters that are cost effective – \$1,000 a year for a Big Brother Big Sister mentor, and about \$700 per child for a Court-Appointed Special Advocate for abused and neglected children. These programs work. You can take some of those education funds and channel it to education institutions. Those people who have the money, the business industries and everything else, should also be at these symposiums and hosting them. They could underwrite the expense of having it in the first place, and then come, and then you give them gratitude for doing what

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<sup>41</sup>Pew Report, *supra* note 10.

<sup>42</sup> See U.S. Dep't of Educ., Race to the Top Fund, <http://www2.ed.gov/programs/racetothetop/index.html>; see also Tennessee First to the Top, <http://www.tn.gov/firsttothetop/>.

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we want them to do in the first place. I mean, we've got to communicate that this is a smart business move, and it is. There are approximately one in 100 people<sup>43</sup> incarcerated in the United States. That's how we're solving a problem. That means correctional, probation, parole, everything. Tennessee is one in forty.<sup>44</sup> So we've been spending money someplace, but it's not helping. It needs to be prevention, intervention, education.

SHERRY JONES: I just want to say as far as the budget process goes, what you need to do is contact your representatives and your senators. You have to let them know where you have strong feelings and what you want them to vote on and what you want them to support. That's crucial.

MICHELLE HOLLAND: Hi. My name is Michelle Holland and I'm a second year law student here. I was just wondering how parenting classes were funded. Are they mostly privately funded, or does the State fund them?

SHERRY JONES: Mary probably knows that more than I do.

CONNIE STEERE: It's different. Some are nonprofits. Some are through mental health institutions. Some are created by the State themselves. Mary, do you want to say more?

MARY WALKER: Yeah. Basically there are a lot of sources of funding. It's not that it's just hanging on the tree.

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<sup>43</sup>THE PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA, *available at* <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf>.

<sup>44</sup>*Id.*



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Somebody has to raise some money, and they may get a grant. Exchange Club<sup>45</sup> gets some grants from foundations that believe in parenting. I think there is a real movement away from thirty-day classes and a lot more towards observing and interacting and going to the home, but that costs a little bit more, so that's another choice that you have to make. There's a piece in your notebook that's got a Big Brothers Big Sisters logo that's an example on the Children of Prisoners Program with the kind of information you need to give Senator Lamar Alexander, Senator Bob Corker, U.S. Congressman Marsha Blackburn, and the people who voted against funding these programs to say, "We want you to do this program. We know one-to-one mentoring works." The things you believe in you've got to talk about to people.

JOHN EVANS: One last question.

ELIZABETH MCDONALD: My name is Elizabeth McDonald and I want to thank you, Representative Jones, for your work with the CAC. I've had cases that were thrown out because a DCS worker didn't have the training, and by the time the kid got to the CAC, everything was so tainted, out it went. Is part of your legislation<sup>46</sup> that those interviews at the CAC have to be videotaped? Because the videotaped ones seem to carry more weight than the ones that aren't videotaped. They're more restricted to just that one CAC interviewer's opinion, where the video speaks a thousand words.

SHERRY JONES: This particular piece of legislation<sup>47</sup> doesn't have mandated videotaping, but I'll ask about that

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<sup>45</sup> Exchange Club Family Center, <http://www.exchangeclub.net/>.

<sup>46</sup> H.B. 1318, *supra* note 19.

<sup>47</sup> *Id.*

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when we get back and see if that's a possibility. You know, we do videotape now.

ELIZABETH MCDONALD: And it works so much better and it carries so much more weight.

SHERRY JONES: I think so too. Thank you. I'll check on that.

LENNY CROCE: Lenny Croce from Anderson County. I've gotten appointed recently to two very medically fragile children who are homebound and need lots of care. In both instances I think what has happened is that both of these children are children of single parents who are very poor, who depend upon TennCare, and neither one of these children receive the services that they should have gotten from TennCare. In other cases I've seen in juvenile court, the parents tried to get the services, like residential treatment for a mentally ill child, and have not been able to and they've been told the only way you can get those services is to put them into State custody. What are we doing to bring TennCare onboard, to provide the services that these children need to keep them out of State custody?

SHERRY JONES: Unfortunately, a lot of that can be done administratively. We, as legislators, haven't really passed any sort of legislation one way or the other on that because, quite frankly, Governor Phil Bredesen, made those decisions on TennCare and on what those cuts were. They keep coming to us and telling us. "We're cutting, we're cutting, we're cutting," and they keep cutting more, and we don't have any money to put in it, or anything else for that matter. So I would say right now that it's just a sorry situation we're in.

(A break was taken)

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JOHN EVANS: Thank you guys for coming for our last panel. To introduce our last panel today is the incoming Editor-in-Chief for *Tennessee Journal of Law and Policy*, the wonderful and talented Carrie Pond.

CARRIE POND: Hello. I'm Carrie Pond and I'll be taking the helm of this wonderful Journal next year, so hopefully any symposium that we put on next year will be as successful as this one was. I'll be brief since this is the last panel. Our last panel is called "Best Practices in Representing Children in Court." In this panel, members of the judiciary will be offering insights into effective practices for representing children in court, so they're going to give you the inside scoop on how to handle some of these ethical problems that child advocates face. On my far right, we have Timothy Irwin, a judge for the Knox County Juvenile Court. In the middle is Carlton Lewis, who is a magistrate judge for Davidson County Juvenile Court. Finally, we have Dwight Stokes, who is a judge for the Sevier County General Sessions and Juvenile Courts.

### **PANEL DISCUSSION 4: BEST PRACTICES IN REPRESENTING CHILDREN IN COURT**

*The Honorable Timothy Irwin*  
*The Honorable Carlton Lewis*  
*The Honorable Dwight Stokes*

MAGISTRATE JUDGE CARLTON LEWIS: I am really, really thrilled to be here for two reasons. Number one, I think this topic of the politics of protecting children is a wonderful, wonderful topic. Secondly, I grew up here in the city of Knoxville. This is my home, will always be my home. I graduated from Holston High School. Our football team lost consecutively to Central High School where

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Judge Irwin was all-city in high school. Any chance I get to come home is a wonderful opportunity to me.

Let me thank from the previous panel Ms. Mary Walker, who was Referee Walker when I started practicing in juvenile court, and later went on to become General Counsel for the Department of Children's Services, at least for the Davidson County region. I think Ms. Walker had some fantastic hires as attorneys for the Department of Children's Services. Also thanks to Representative Sherry Jones. You can never go into a committee hearing dealing with children, youth, and families and not see Representative Jones stick her head in at some point, whether she's got a bill before that committee or not. I can truly say that she is interested in children and families.

We've got ninety-five counties in the state of Tennessee, all of which have a juvenile judge who hears juvenile law cases either on a full-time basis or has some other jurisdiction in addition to his or her juvenile court jurisdiction. With those ninety-five counties and those judges, you've got at least that many different personalities. In order to be an effective attorney representing your child client or representing your parent client, I strongly urge you, especially in Davidson County, to find out what your judge's hot buttons are and avoid those hot buttons if at all possible. Find out what your judge's prejudices and passions are, because we all have them. We try to hide them the best we can, but we have them. The more you know about our personalities, our likes, and our dislikes, the more effective you are going to be in representing your client. I had an attorney ask me several years ago, "What does it take in your court for a parent who has been found to have severely abused his or her child to get their child back?" And I looked her in the eye and I said, "Quite frankly, I don't think they can ever do enough." That's my prejudice, people who harm young children and elderly people. Had she wanted to use my statement to have me recuse myself, I would have recused myself. What I wanted

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her to know, and what I want all attorneys to know, is when they come into not only my court but to any courtroom, they should always be able to expect consistency. Some of us are going to be consistently one way or the other. As long as you can tell your client that that judge is always consistent when it comes to that issue, then you've done your client a favor.

We've got difficult budgetary times in Tennessee right now, and the vast majority of attorneys in Davidson County who practice in the juvenile court are appointed and are reimbursed for their services through the Administrative Offices of the Court. You all probably heard some discussion about reimbursement this morning. There is an ethical dilemma that you as an attorney need to be aware of and hopefully you will avoid at all times. You're appointed by the court, you're reimbursed by the Administrative Office of the Court, and you are reimbursed at a particular rate for out-of-court and in-court time. The more activity you have on your case, the more money you're going to be reimbursed for your services. You have another interest that should be at least as important as your financial interest, probably superior to your own financial interest, and that is the interest of your client. I'm familiar with a situation where a mother was alleged to have severely abused her children for a second time. For some reason, notwithstanding the admissions that the mother had made, she went to trial on that case. The court found that the children were severely abused, and the court had to remove those children after that finding. The problem with that came to be the Department of Children's Services had made an offer to the attorney representing the mother to settle that case, and the settlement offer involved a finding, but not a recommendation, for removal of the children. The attorney tried that case rather than settle the case, and maybe that was a decision that his client made, but I also know that the attorney appealed that case, and appeals in juvenile court are *de novo*, so he had a second trial that he

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billed to the Administrative Office of the Court. The judge hearing the appeal affirmed the ruling of the magistrate. So there is still a severe abuse finding and the mother has not, and likely will not, regain custody of her children. I'm concerned that because of difficult economic times the attorney very well might have made a decision to try this case, appeal this case, do post-dispositional work, and pad his claim for fees to the Administrative Office of the Court while disregarding the legal interest and the best interest of his client, which was to resolve the case to retain custody of her children. Be very, very careful ethically in making decisions in the representation of your clients. Lawyers still should not take on representation in matters with which they are not familiar or confident. Juvenile court has become a very specialized court. I frequently tell folks that juvenile court judges can do something that Supreme Court judges cannot do – that's terminate the rights of parents. United States Supreme Court judges don't have that authority. So what we do in juvenile court is very, very important; it is becoming very, very specialized. I'd love to have as many attorneys get experience in juvenile court as would like, but it is very important to become very familiar with the Rules of Juvenile Procedure. Ten years ago, you probably would never find an appellate opinion addressing a matter from juvenile court. Now we have a large body of law from the Court of Appeals, particularly in the area of dependency and neglect, as well as termination of parental rights. So there's a lot to work on and be familiar with.

The last thing that I would like to caution you on is there is a phenomenon in some counties – and it happens; we may as well fess up to it – quite often, judges have a lot of influence and a lot of authority because a lot of attorneys depend heavily on receiving appointments in juvenile court, in general sessions court, or wherever. I think, as a result of that, sometimes an attorney's client may have a particular interest and the attorney may not always be willing to shake the walls as they need to because they don't want to run

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afoul of their judge. They depend heavily on their judge for appointments. I don't know the answer to that situation for you, particularly as young lawyers who might come in to the juvenile court system. I understand that it is easy to become friendly with other attorneys, particularly when you work with the same small group of attorneys on a regular basis, but try to the extent you can not to allow your friendship or your personal relationship to cloud your personal professional judgment as it relates to your clients. When you are able to do that, I think you become a very effective advocate on behalf of your client.

JUDGE DWIGHT STOKES: It's good to be here today. I'm excited, like Carlton is. Carlton and I work together on the Tennessee Commission of Children and Youth. We also have a great experience there. They won't let us sit together there because we cut up too much. We get in trouble just like school kids. I wanted to just speak to you a little bit today. I have an outline but the outline is too much for me to cover. It does include some excellent resources because they're not original from me. I don't have many original thoughts, but I am a good collector of certain resources. I wanted to talk about seeking justice for one child at a time. The emphasis I wanted to make is that every one of us who is interested in children and young people need to fully understand what the juvenile justice system is about. We don't have any choice but to be all in. We need to be a hundred percent committed if we choose to serve in the juvenile justice field. We must be fully aware of the fact that we must fight to find resources, we must fight to educate judges, and I really do challenge you to do that.

As Carlton mentioned, every juvenile court is different across the state. That has many, many challenges. But you need to fight to educate judges about the real issues and point them to it. You need to educate caseworkers, probation officers, and service providers as to the specific needs of a case. The specific needs and the

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specific strengths of a child and family should be emphasized. Lawyers and other advocates must know that if justice and fairness are to be achieved, it must come through hard work and an understanding of the juvenile court system. You must not assume that anybody is going to do her job. You must not assume that there's a caseworker that's going to do her job; that a probation officer, even the judge, maybe especially the judge, is going to do her job. You must press to see that they actually do it. You must be ready to fight hard with the powers that be, whether it's an ornery judge like Judge Irwin or me, you must be ready to stand up. I know you've heard that several times.

Let me just hit a few highlights of what I have on the outline. If you have that, you can just follow along with me. Achieving justice is achieving what is just in conformity with the truth and the facts, regardless of any race, gender, socioeconomic status, or other potential bias. It means doing right by each child and by the specific circumstances. First off, I think all child advocates need to know that the juvenile court is engaged in the work of child-saving. We're here to save children. I've got a little article there that talks about how, back in 1891, it was originally started with the concept of we are to be child-savers, that all children should be treated as children.<sup>1</sup> I met Judge Andrew Becroft out of New Zealand at a conference and we became good friends, and he wrote an article<sup>2</sup> that I have quoted in there, but he has a few very interesting points that we really need to understand as we work in the juvenile field. First, childhood is typified by risk-taking and

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<sup>1</sup> Ann Reyes Robbins, *Troubled Children and Children in Trouble: Redefining the Role of the Juvenile Court in the Lives of Children*, 59 JUV. & FAM. CT. J. 3 (Winter 2008).

<sup>2</sup> Judge Andrew Becroft, *Children and Young People in Conflict with the Law: Asking the Hard Questions*, 57 JUV. & FAM. CT. J. 1 (September 2006).



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impulsive behavior.<sup>3</sup> That's going to happen. It's the norm. Second, children do not have the same developmental level of cognitive or psychological maturity as adults, and therefore they are more vulnerable to provocation, duress, or threatening behavior, and they're more impressed by peer approval and a fear of rejection.<sup>4</sup> Third, offending by young people is often symptomatic of care and protection issues, as you've heard, to which a purely judicial response is destructive and unjust.<sup>5</sup> Attempting to unravel and deal with justice and welfare issues within a traditional adversarial court system is very difficult. He talks about all of us being willing to ask the hard questions; attorneys being willing to ask the hard questions, and judges being willing to ask the hard questions. But one of the best quotes is the last one I have quoted there: he says the majority of young people will grow out of offending if they are kept away from the criminal justice system, are made accountable for their crimes, and are given the right support.<sup>6</sup> I think that's really important. You need to keep young people out of the juvenile justice system. How do you do that? You have informal adjustment. You have ways of approaching people and caseworkers, and you find out within your own system. You need to educate the judges and the powers that be. We need to have people out of the criminal justice system. The longer they're in it, the more likely they're going to fail. The more we can get them connected to services and to bring out the strengths of their families, give them help within their families and put people out in the field, the more likely we're going to make an impact.

The second major point is that it's crucial for all juvenile court professionals to understand the basic

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

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provisions and purposes of the juvenile justice system. You can start off with T.C.A. section 37-1-101,<sup>7</sup> which gives you a lot of ammunition with anybody. It says that, first off, the purpose is to provide for the care, protection and wholesome moral, mental and physical development of children coming within its provisions.<sup>8</sup> Secondly, it's consistent with the protection of the public interest to remove from children committing delinquent acts the taint of criminality.<sup>9</sup> The judge starts off with that as the objective: that we're trying to not criminalize these children and we're not trying to make them think of themselves as criminals; we want to give them an opportunity to turn from their ways and help shape their lives, and we do that in a family environment. It says in point three: removing a child from the child's parents "only when necessary for the child's welfare or in the interest of public safety,"<sup>10</sup> whether it's on the delinquency side or the dependency and neglect side. "Provide a simple judicial procedure."<sup>11</sup> We should protect all the rights of *In re Gault*;<sup>12</sup> the procedure should protect all their constitutional rights.<sup>13</sup> But also we should keep it simple, and have cooperative measures interstate.<sup>14</sup> All judges know that's a joke. When we do things interstate, it's a very difficult process and time-consuming.

We need to deinstitutionalize children.<sup>15</sup> I have a practice point there I just want you to note with me. Attorneys and juvenile court professionals must use their skills in case preparation, including knowledge of their clients and families, to help craft and shape remedies to

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<sup>7</sup>TENN. CODE ANN. § 37-1-101 (2011).

<sup>8</sup>TENN. CODE ANN. § 37-1-101(a)(1).

<sup>9</sup>TENN. CODE ANN. § 37-1-101(a)(2).

<sup>10</sup>TENN. CODE ANN. § 37-1-101(a)(3).

<sup>11</sup>TENN. CODE ANN. § 37-1-101(a)(4).

<sup>12</sup>*In re Gault*, 387 U.S. 1 (1967).

<sup>13</sup>See TENN. CODE ANN. § 37-1-101(a)(4).

<sup>14</sup>TENN. CODE ANN. § 37-1-101(a)(5).

<sup>15</sup>TENN. CODE ANN. § 37-1-101(a)(6).

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address the problems of young people. I love attorneys who come into the court and have interviewed people, know about their clients, and can even file something with me and just say, "Your Honor, what we have in mind is the parents have already addressed it this way, we're already doing this, we've already got the children in this kind of activity, we're trying to do this," and how the attorney may have helped the parents or somebody already gear up toward a certain thing. That may not be able to happen always, but there are those times where you can get appointed and try to get in enough time into it to where you're crafting a remedy and helping to shape it, that I can see an engaged attorney, that I can see an engaged family already trying to deal with it, and that can be extremely impressive.

I talk a little bit about the role of a guardian ad litem. Here is the simple rule I have: don't be a guardian ad litem if you are not willing to do what it takes. Don't get into it, because it takes really being involved. I had two guardians ad litem recently that came in and filed a motion because they did not feel that DCS was doing their job in those particular cases. Now, we have a good DCS attorney in our county who is very active and does a good job, but it's good to have dissenting opinions. On one of the cases, I found in favor of what the guardian ad litem was seeking, and in the other, I did not. Both of them did a very good job and both of them accomplished their purposes by getting something filed in there for me to listen to. But that's very important, just taking the initiative. I have a little bit in there about *In re Gault*<sup>16</sup> and the duties of attorneys. There was a former law student here, Marcos Garza, who wrote an article in the Knoxville Bar Association,<sup>17</sup> and it really impressed me just to hear what he said. He talked about

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<sup>16</sup> *In re Gault*, 387 U.S. 1.

<sup>17</sup> Marcos M. Garza, *What It Means to be a Lawyer*, 35 DICTA 8 (June 2008).

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how he worked out a deal on behalf of his client that he thought was a really good deal. The problem is he didn't really stop to think on that particular occasion about what impact that good deal would have on his client. Then he went back and talked to a professor here at the law school, and she emphasized that you really need to tailor your remedies toward the families, toward the individual people. It made a big impression on him, and he realized that this is not my case as a lawyer, it's my client's case, it's that family's case, and it's that child's case. In that particular case, it was an adult, but who was an a single parent who had to work, and for her to be able to do something as simple as attending classes at night was going to be an impossibility with her family. Even though it would have been a good result in many cases, it was not a good result. Whether you're dealing with an attorney general or the DCS, just because they come up with something doesn't mean it's the right deal. I know you know that, but it's trying to say I know this may be a good thing in most cases, but it's not good in this case because of the transportation problem my client has. So craft your own remedies and impress the judges with how engaged you are in a case, and that can go a long way.

I've got an article<sup>18</sup> there about duties of attorneys representing youth in delinquency cases. It applies both ways: delinquency, dependent, and neglect. You must zealously represent your client in these points. Have a particular interest in youth and family systems if you're going to do this. Investigate the client's case, and be informed of special needs. We have people like Dean Rivkin that are here in the law school that have spent their lives and spent a lot of their time, and a lot of others, like Ms. Barbara Dyer, that work on special needs. What are the special needs? What are the interests of this family? What

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<sup>18</sup> NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, JUVENILE DELINQUENCY CASES 30-31 (Spring 2005).

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do you need to do to try to make this family whole and give them the resources necessary? File pretrial motions. If you've got a judge that has a lot of issues, getting a judge's attention early can go a long way. It can be very impressive, particularly if it's individualized to that particular case.

Thirdly, all juvenile justice professionals, beginning with the judge, must see that procedural fairness actually occurs. Now, let me emphasize this. What these studies<sup>19</sup> show is the more engaged the client is, the more that they feel that the system is transparent, the more they understand what's going on with the judge and the probation officer, then the more likely they're going to comply with orders. If they comply with orders, they're going to be more successful: if they understand them, if they know the decision-making process, even if they don't like the idea. That's a big deal. Judges can be more clear, more precise in their orders. We can try to make it clear and try to make it transparent. It takes more time. I try to do that in every case, juvenile or general sessions. I want them to know why I'm making a decision – it helps them if they want to appeal something – but I want them to know what's gone into it. I want the juveniles and the parents and others that come before the court to think that we are a benevolent court system that wants to see good things for the young people and for the families. Yes, there can be punishment involved, but I think it's important for a parent to know they will have an ally if they're doing the right things, and maybe not so much if they're guilty of abuse or neglect, but even those can see that there are resources that we're trying to set up, if we do it right. The material talks about giving them an opportunity to voice things. I see a lot of public defenders, and a lot of counsel from time to time, say, “No,

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<sup>19</sup> See Kevin Burke & Steven Leben, *A White Paper of the American Judges Association: The Voice of the Judiciary: Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4 (2007).

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don't say anything, don't say anything.” That is important sometimes, but, every now and then, there is a time that's very important for them to be able to voice it out and for us, as judges, to be patient and willing to listen to what's going on, feel and hear what they are feeling, and not be too judgmental about it. Because it's very hard for a court system to come into your home. It's very hard to have people intervene in your lives. I can guarantee you, as a parent, I would not have liked it. I would have wanted to have it out as soon as possible.

We need to make sure that we have unbiased decision-making, make sure we respect people that come in front of the court, and that attorneys respect their clients and their need to say some things, and to have trustworthy authorities. But it's very important to show procedural fairness. When they think that things are fair, when they perceive that things are fair because they're getting an opportunity to speak, they have a representative who is appointed, you have a guardian ad litem in place, you have the attorneys in place to represent, they get a better feel that there is a fair system in place, that really helps them to be able to comply with the decisions that are handed down. Perceptions of procedural fairness differ dramatically among minority and majority populations. Court systems need to reach out. I serve on the Statewide Disproportionate Minority Contact Task Force, and there are a lot of things that happen in minority populations that are just not fair. There are a lot of things that we need to reach out for with populations to show them that we care. Most young people who are black that step in front of a court system are looking into the face of a white judge in Tennessee and most other places. So we need to show them that we are concerned enough, that we want to be prepared enough, that we want to have people out in the field so that they don't have to ask the question “What can that judge possibly know about me? He can't possibly know much about my neighborhood, or where I am, or what I've done

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with my life.” No matter what race they are, people need to feel like we're interested, that we want to get the real facts, are willing to listen to them, and give them an opportunity in the juvenile court system. I realize we have all types of crimes that come up, and some may be particularly violent, but we still have a duty to treat people with fairness and make decisions that are right and based upon the facts.

I have some material there for you to consider about foster care, in making sure you let people that are in foster care have a voice and talk and speak up. The juvenile courts should be the great leveler in our communities. In other words, all participants in our judicial system, including judges, district attorneys, defense lawyers, guardians ad litem, probation officers, law enforcement officers, school representatives, everybody, should advance the cause of justice for all. One of my favorite quotes from *To Kill a Mockingbird*<sup>20</sup> talks about how the court system should be the great leveler, no matter what color, no matter what race, no matter what background, we should be fair and level the playing field. But that just isn't happening. It doesn't happen. That presumes that a presiding judge is really wanting to seek justice. It presumes that people have effective legal representation. It presumes that law enforcement officers are doing their job, and on down the line. Cornel West says in *Prisoners of Hope*, “We need a moral prophetic minority of all colors who muster the courage to question the powers that be. The courage to be impatient with evil and patient with people, and the courage to fight for social justice.”<sup>21</sup> We just need to question what's going on when you have a system that has so many flaws to it and ask, “What we can do to make it better?” I

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<sup>20</sup> HARPER LEE, *TO KILL A MOCKINGBIRD* (Grand Central Publ'g, 1960).

<sup>21</sup> CORNEL WEST, *Prisoners of Hope, in THE IMPOSSIBLE WILL TAKE A LITTLE WHILE: A CITIZEN'S GUIDE TO HOPE IN A TIME OF FEAR* 296 (Paul Rogat Loeb ed., 2004).

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really think that the people in this group are the best place for that to start: people who are interested in kids and representing young people. What can you do to make a difference? I have a lot of material in here about disproportionate minority contact, how a judge is supposed to be over everybody and make sure they're doing their job, and that each party, including people who are representing people of color or people who are representing through the guardian ad litem, that you are trying to make sure that there is fair treatment and you're standing up for the issues.

I have some matters in here about the school system, about certain policies we need to deal with. I talk about a book written by Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Color Blindness*.<sup>22</sup> It's a great book primarily about adult incarceration of minorities, but it also talks about how someday we're going to have to look back on a system that totally failed millions of people and wonder how we could have possibly let it happen. Alexander concluded, "As a society, our decision to heap shame and contempt upon those who struggle and fail in a system designed to keep them locked up and locked out says far more about ourselves than it does about them."<sup>23</sup> One day our society, in particular juvenile justice professionals, will be forced to look back on our current system, which has failed to address DMC<sup>24</sup> issues for many years and many other issues we could throw out today, and marvel at the thought that such a system of juvenile justice is allowed to go on for such a long time. We all have to look back on a system that incarcerated so many young people who could have been treated more humanely and wisely. We will see so many kids and young people utterly betrayed by a disgraceful system. We will have to wonder

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<sup>22</sup>MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (New Press 2010).

<sup>23</sup>*Id.* at 170-71.

<sup>24</sup> Disproportionate Minority Contact.



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how we missed so many obvious signs that young people of color and young people of poverty were being mistreated in the juvenile justice system and given no chance to succeed. And we're going to have to look at ourselves in the mirror someday.

Finally, I have a few materials about the special education needs. An advocate must be educated about special education needs and understand all that there is to know about what needs to be done when a case comes up where there's a special education child. When you should bounce that out of the juvenile justice system and what steps need to be taken. You can read about those and/or talk to some of the panel over here.

And I'll also talk about one other thing at the point where I finally wind down – and I have one minute of time – juvenile justice professionals, including judges, should commit ourselves to seek justice for each child and try to implement and individualize the juvenile justice plan. Dean Rivkin was telling me about a resource he had read that had about the same things that are in my materials, but we have an IEP<sup>25</sup> in special education, and what I want to do in my system is try to get as close as we can to having an individualized juvenile justice plan for each child. And it takes everybody working together. It takes attorneys being attorneys and advocates. It takes probation doing what they need to do. It takes youth resource officers doing what they need to do, and all of us coming together to try to address the issue. And you can read some of the quotes there. But it's a fascinating idea that's in these materials that Claudia Wright had written in an article I just recently read.<sup>26</sup> She concluded, "The choice is whether we can afford to try

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<sup>25</sup> Individualized Education Program.

<sup>26</sup> Claudia Wright, *Rethinking Juvenile Justice: Using the IEP Concept to Create a New Juvenile Justice Paradigm*, THE LINK: CONNECTING JUVENILE JUSTICE AND CHILD WELFARE (Child Welfare League of Am.), Fall 2007, at 1.

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something that has a real chance of working. How much is it worth to improve the quality of life in a society, to eliminate inhumane treatment of children, and to create productive citizens?"<sup>27</sup> She said it is worth everything for us all to try to come together.<sup>28</sup> You know, the judge has to be a judge. The judge has to enforce due process and has to be willing to listen to cases, hear the burden of proof, and make a decision. I'm not talking about advocating that, but I am talking about a judge having a role of having to supervise and make sure people are doing their jobs and trying to create an environment that's fair for everybody.

And my last thought is, on the last page, I went to a conference in Washington, D.C., The Cradle to Prison Pipeline, and Judge Judith Kay was speaking there and she told us that we should internalize this notion as we have a case: Are the efforts that I make – the judge, the probation officer, the attorney –are the efforts that I make good enough for my child? If this was my child that I was representing, if it was somebody representing my child, are the efforts that I'm making good enough for my child? And if it's not good enough for your own child, it's not good enough for anybody's child.

JUDGE TIMOTHY IRWIN: How much of my time did he take? Can everyone hear me? I'm a little tall for that podium. Can you hear me okay in the back? In my misspent years as an adjunct professor over here, I never had any complaints. My students were consistently smarter than I was, and it was very difficult to teach under those circumstances.

I took a little different approach to today's topic. And I have relatively little experience compared to the two gentlemen who are up here with me. I've been a judge for five years. But I think it's important that you understand

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<sup>27</sup> *Id.* at 6.

<sup>28</sup> *Id.*

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what I think will help you in Knox County Juvenile Court. I know we have a lot of practitioners here. If you've practiced in Knox County Juvenile Court before as appointed counsel, as free counsel, as a University student, hold your hand up just so I can see how many. Yeah, most everyone. Okay. I want to tell you initially that my goal for our children – I think it's important you know that, and I've tried to cut through all the BS and I've tried to break it down – and it's not possible for every kid, but I want our children when they're eighteen years old in Knox County to have a diploma. I want it to be a high school diploma. It takes twenty-eight credits to get one. Sometimes that can't be accomplished for a variety of reasons. But I think you're facing an uphill challenge in this world if you try to raise a family and support yourself without one. In this county, you need to have a driver's license. Knoxville and Knox County were not designed for mass transit to be effective. If you want to work, you have to be able to get there. One of the main problems we seem to have in Knox County Juvenile Court is that we have a lot more resources than some of our neighbors but we can't get our people to the resources. It comes up over and over again. “It's not on the bus lines, Judge.” “I can't drive.” “My mother lost her driver's license.” “Our car won't work.” You can very easily find yourself being a shuttle service as an appointed counsel in Knox County. I'm sure some of the people in the education practicum that are working in my court know exactly what I mean. It's a problem. So I want my kids to try to have a driver's license. The third thing, perhaps the most important, and I always try to ask them when I get the time: “Tell me about your life plan.”

I have a great job. I get paid to wake up in the morning and go into work and try to figure out how to make a child's life better. Yeah, we have to protect society sometimes from children, and Dirk Weddington gets to do most of that, but I get to try to figure out how to make a child's life better. And I can tell you in five years I believe

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in my heart I have made more mistakes of omission than commission. I've waited too long. I've been too patient. I've tried and tried for Mom and Dad. I've tried to hold things together with Band-aids. I think I would have been better off a lot of times striking like a cobra, just right now, you're gone, it's over. I hate to admit, I'm part of a bench that enabled services to go on in a family for ten years, where five kids – not all five at once, but over ten years, five kids – eventually all had to come into custody. Since they've been in custody, they're doing great. I let that go on too long. Maybe I didn't have the wisdom. Maybe I didn't have the opportunity. Maybe I didn't believe the law. But sometimes I feel like I'm too slow to strike. The reason I'm telling you this, I think it's important you know what makes me tick, what makes my magistrates tick.

We have 31,000 matters coming through this county's court; 31,000, from child support, to traffic tickets, to termination of parental rights, to transfer hearings for murder. We have a plethora of sexual stuff right now. I don't know what's going on in the world. I don't know if people are just finally telling the stories and they've always been there, or we got more of it. You know what the pills and the pill mills are doing to our court. Dependence and neglect was up nine percent last year in Knox County. Your fees aren't going up. One of the things I want to remind you, when you appear in our courts and you have private counsel in there with you, you jump up and you stomp your feet and you ask me to set aside money for you now. I will always do that. I want you to get paid. I don't want to lose a single one of you. You're my heroes. Being a judge in a county of this size, it's not a monarchy; it is just a member of a team. I have to rely on five lawyers from the Department of Children's Services. I have to rely on people willing to come down and work for forty to fifty dollars an hour because they love children and love the work. Maybe some of them can't get anything else, but I don't believe that to be the case. They are passionate about what they do.

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I have partners like Helen Ross McNabb who provide mental health care to indigent people. I have Boys and Girls Clubs who pick the kids up from school and try to fill that void. I'm part of an elaborate team, and a lot of that team is in my building. I think it's important that you all know who's in the building with you, where you can go get a mental health evaluation. What does Assist do? Assist is that group of interns from the good ole University of Tennessee headed by Marie Bly that can get you quick mental health assessments, that can steer you in the right direction, can tell you how to get stuff paid for. We are practicing in a world of shrinking resources. We don't have enough to go around. You've got to fight and scrap for your client to make sure they get their part. You may need expertise from Marie Bly, or someone like her, to tell you how to get TennCare to pay for something. Twice, since I've been a judge, I have issued subpoenas for gatekeepers from insurance companies to come to my court and tell me why, as a retired radiologist gatekeeper, they disagree with two mental health professionals that say a child needs inpatient, residential care. They caved on the courthouse steps both times and never appeared in my court, but they paid for the child's treatment. Don't be afraid to do that. I've got your back if you want to do that.

Judges hate surprises. We hate surprises. I, at seven a.m. in the morning, when I walk in, want to try to figure out how my day is going. I really want to know what I'm going to have in front of me that day, and I do my best to figure it out. I want you to take care of the surprises early. I want you to get all that worked out beforehand. I don't think we exercise motion practice enough in Knox County. I don't think we – and I think partly because our department is pretty receptive, if you ask them for something, they'll generally give it to you – but I don't think we exercise our motion practice enough on the delinquent side, or on the civil side. I'd like to see more of that. I would like to see you have the ability to have pretrial conferences before it's

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time to go, which would mean a lot of times three attorneys all had to show up there before the whistle. I think it's a good idea to be early in my court. If I see you poke your head in there on a busy day and sit down in the back and wait until I see you and kind of nod, your case is going to be called shortly thereafter. If you want in and out of my court, let me know you're there. Let me know you're there. Again, 31,000 matters, no sense in you being last.

Understand the frustration of your clients. Understand what it's like to get a letter in the mail that says you're a father. "Oh, yeah, that was ole what's her name. Oh, no, I'm not." "Okay, well, sir, then you need to go down to these lawyers' offices on Gay Street and get a paternity test." "Yeah, I'm going to do that." A few weeks later, the mail comes – congratulations, 99.9 percent likely to be this child's father, we can't rule you out. Then you get a court date for child support. You come down to child support, the judge says, "Mr. So and So, you make X and we've put these numbers in the income shares model and you're going to pay X." And you say, "If I've got to pay, I want to see my kid." That's how our cases start, now. You need to know this. "I want to see my kid if I've got to pay." "Oh, well, we don't do that at this location. Judge Irwin will not allow us because of our high volume to sign anything but agreements on visitation or custody of a child in this court. You need to go to Division Street." So I truck down, get on the bus, and ride that bus to Division Street. I get out, I walk in, and I meet one of my nice ladies in intake, who are very experienced workers – It's headed by Mary Lindsey – and I go into intake, and the intake worker says, "Can I help you?" I say, "Yes, ma'am, I want to see my kid. I'm the dad, I want to see the kid." "Well, fill out this form, sir, and petition for custody visitation. By the way, it will be \$136.00." "What do you mean? They saw me up there for free." "That's right, you were the respondent. It's \$136.00." "All right. So let me take the bus back and get this check cashed and I'll be back." So I do all that, and

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come back, fill all this out, and turn it in with \$136.00. This is a big deal, now, and they've gotten this done, and they're feeling pretty good. "Okay, sir, before the court will agree to hear your case, they require cases coming from child support to be mediated." Mediation is next door in that trailer. So you walk out and go over to the mobile building, and you see Jackie and have your case mediated, which takes a while. They're pretty quick. They send the case back to us, and if you don't have a resolution, then finally you get a court date. And, of course, in the meantime, if there are allegations of dependence and neglect, we go down a whole other road.

I understand, and I feel the parent's pain sometimes. I understand how difficult it is to even get in front of one of us. And I believe we're pretty much an open enrollment court. Any private citizen can come down there and file a petition about anytime they want. Again, it's getting there, it's paying for it, it's figuring out how, and doing all that without the advice of counsel. It's tough. I said it before, I don't want a bunch of surprises and ambush. We're dealing with children's lives here. I want to know all the factors so I can make a good decision. I want you to agree on as much as you can before the day of court. I want you to talk to Ralph Maylott, David Hull, Susan Kovac, Barbara Johnson, or Kathleen Parsons. I want you to talk to each other. I want you to see what the guardian's position is. I don't want you to be surprised. I don't want a guardian in my court that has to be introduced to their child at the time of trial. I'm not interested by that. If you're going to be a guardian, you've got to go. You have got to go if you're going to be a guardian. You've got to go to the child and family team meetings. You've got to go to the foster care review board. You've got to see your child at school. There are easier ways to see a child than others, but you've got to go. You've got to let me know you've gone. Let me know what you know. You are my eyes and ears. I would have liked to have heard Lucie Brackin's talk, because I feel like I know

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Lucie Brackin very well. I've never seen her, but I have talked to her for hours because we were both on the 40A Supreme Court panel looking at that law and trying to fix it so it will work. I would have very much liked to hear her speech. She knows a lot about the roles of a guardian, what a guardian needs. Know where the DA and the Public Defender's offices are. Know how to get back and see DCS. Know all nine probation counselors and all eight family service workers. Know their supervisors. Know the court directors. Know the thirteen security officers and two bailiffs and the PBS guys out front. Know my paralegal, Barbara Miller. Know my cell number. Know my direct office number. Know how to get a hold of the people you need to get a hold of to help the kids. Help the kids. That's what we're there for, that's what we wake up for every day. Nobody in this room is getting rich in this field. You wake up every day because you have a passion to help children. If you can make a living along the way, that's great.

I want to back up just a minute and I want to talk about Assist. They get a tremendous volume of cases. Remember, that's a great resource. It's free. It's six master's-level social workers, almost licensed clinical social workers, that work under Marie Bly, who has thirty years of experience. They can get you a mental health assessment quickly. They'll help parents. They'll help kids. They help families. Don't forget about that resource. It's underutilized.

Who knows what the expungement powers of the juvenile court are? I think I got the most power of any judge in the system. I can expunge a conviction. Find me another judge that can expunge a conviction. I won't even say what Dr. Bill Cherry used to say; that wouldn't work in this crowd. But find me a judge that can expunge a conviction. Your judge can. We can only expunge the records that we have on site. I can't order law enforcement to expunge their arrest records, but I can expunge juvenile court records. And I can tell you, in Knox County if you



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want to help your client and you got one you think you can get in the Army, Navy, Air Force, Marines, anything short of murder and rape, I'll make it go away if you show me that they're in. If they pass the ASVAB,<sup>29</sup> if they pass the physical, if they feel the call to serve their country, I will make things happen for them. I will seal it. I will expunge it. I'll extinguish it. I'll shred it myself. I'll burn it. Anything short of one of the old X crimes, it will go away. I promise you I can do that under the statute.<sup>30</sup> Read it. To my knowledge, no data from Knoxville Juvenile Court has ever been entered into a Cray computer anywhere, thanks to Judge Garrett. He refused to let information out of that building. I am doing my best to follow in his footsteps. It does not need to be entered in a database where it can come back and haunt these children for the rest of their lives. If it gets in that database, no one can get it out. That's why JASIS<sup>31</sup> is a closed system. But I can wipe JASIS clean. The statute says I can.<sup>32</sup> I don't do that enough because people don't ask me to do it enough. People don't ask me to do it enough. I would do it more. I would do it in every case I had when they turned nineteen. Even if I said no, I would ask me to think about it.

If you come up with an alternative, I will listen. If you can show me a way to save that child's life without placing that child in custody, I will listen. If you show me a treatment alternative, I will listen. Understand the Department of Children's Services. I believe this was when R.A. Chapman was running things over there, I asked for a flow chart because I wanted to understand who worked at DCS and just what they did. I got a flow chart back, and they were divided up into five clusters. That was the name of their work groups; they were clusters. And I thought that

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<sup>29</sup> Armed Service Vocation Aptitude Battery test.

<sup>30</sup> TENN. CODE ANN. § 37-1-153(f) (2011).

<sup>31</sup> Journal of the American Society of Information Science.

<sup>32</sup> TENN. CODE ANN. § 37-1-153(f).

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was very apt. I love my Department of Children's Services. The reason for our court's existence is the deterioration of the family unit in our community. Three magistrates working full-time hearing child support cases of unmarried parents in this county – every day, all day, as many as they can hear. One magistrate working hearing the married folks and divorced folks cases, and our people all hear about twice what she hears – not that she is slack, I mean, she just doesn't have as many cases.

Don't set two cases at the same time. Keep your calendars accurate. Don't make me go down and beat up Kay Kaserman or Irene Joseph to get you in my court, because they're probably going to win anyway because they have probably forgotten more than I'll ever learn. Remember why you chose this field. Every day when you wake up, make a kid's life better. Some of them just need somebody in their life. I would say most of them just need somebody in their life. And if you don't feel you have the resources to help, ask somebody that works in the court. If they refuse to help you help your child, let me know about it, let me know about it. My mission as judge of the Knoxville Juvenile Court is to be standing out there, maybe with a cane, when they shut those doors and padlock them because there's no more need. That's what I'd like to see happen. I would not like to expand it. I would like it to shrink from disuse. Thank you all for being part of the team.

JOHN EVANS: Thank you to you guys. We'll do questions in just a minute. But that was very lively so I didn't know if you guys wanted to respond to each other – that's also fine.

JUDGE TIMOTHY IRWIN: We'll just take some questions from the floor.

JOHN EVANS: I'll start off then. I'm about to be an attorney graduating here in a couple of months. Do you

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guys have any pet peeves, maybe common mistakes, that new attorneys make in your courtrooms, given how some of us may be appearing in your courtrooms in just a matter of a few months from now?

MAGISTRATE JUDGE CARLTON LEWIS: I think Judge Irwin hit on one of the things that's probably a pet peeve for everyone. There's an anxiety about getting appointed and getting paid in a juvenile court case. There's a ton of activity that goes on between getting appointed and getting paid. And, as Judge Irwin alluded to, if you haven't done everything in between, you don't deserve to get paid. Because a child or a family comes into the court, there's the intake process, there's the adjudication, and there's the disposition. If there's a commitment, there's the child and family team meeting, the permanency staffings, and the permanency hearings. It takes a lot to get away and attend each of those staffings. But if I'm having heart surgery, I want my surgeon involved in every step of the process. And these clients have a right to have their attorney involved at every step of the process. So my pet peeve is for a family or a child to come in to court and, A, say they've never met their attorney, or, B, it's been six months since they last talked to their attorney and there have been fourteen or fifteen other meetings. So an attorney not fulfilling his or her responsibility is a pet peeve. And, like Judge Irwin said, we're not getting rich doing this. None of us have got into the juvenile court system to make a fortune.

JUDGE DWIGHT STOKES: I'll just add to be on time, or have permission not to be on time, because you have to be somewhere else that's urgent, at least in our court. And, also, let your client know what they need to do when they're in court. I see way too many attorneys that may not talk to their clients about how to behave in court. If my own children would have come into juvenile court, they

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probably would have leaned on the podium, and they would have probably been slumped over. That's how teenagers act. It just is helpful if you just tell them how to address "Yes, sir," or "No, sir," or "Yes, Your Honor," or "No, Your Honor." Just let them know in advance so that they can just be a little step ahead. I had to go over in Blount County in front of the former Judge Crawford over there, and he was a stickler. The very first time I appeared in front of him, I went up there, and he said, "Approach the bench." His bench was this high, and I leaned on it. He said, "Adjourn court." And we adjourned. And then his clerk came up to me and said, "Don't ever touch his bench, just never touch it." So I wish somebody had told me that and I wouldn't have touched his bench.

And then I had a client that was like talking to a gourd – he really was – but I took him over to Blount County and we had the first plea of the day worked out. I was from Sevier County and I was going to be able to leave and go home, so I was there entering a plea. And I said, "Say 'Yes, sir' or 'No, sir,' 'Yes, Your Honor' or 'No, Your Honor,' you've got to say that, do you understand that?" "Yeah." "Do you understand that?" So I went over that ten times. We got in there as the very first case, so I'm going to get out of there, because we had the plea agreement worked out. And Judge Crawford says, "Do you understand your constitutional rights?" And he goes, "Yep." He tried that one more time, and he got another "Yep," and he said, "Mr. Stokes, take your client out in the hall and instruct him on proper courtroom decorum and then come back." Well, at twelve p.m. I got to come back. But, anyway, help yourselves out and help your client out by just giving them a little bit, because that will really help them and go a long way.

MAGISTRATE JUDGE CARLTON LEWIS: Just to follow up on that, and the Code of Professional Responsibility, the code of ethics for attorneys, actually

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instructs you – and I wish I had brought it with me – but it tells you that you are to in effect instruct your client on the facts of life, and you don't necessarily have to do it in language that you would use in polite company. And that's basically what the Rules say – if your clients understand something in a certain vernacular, it's your responsibility as the lawyer to explain to your client in language that he or she can understand.<sup>33</sup> If I go to a mechanic and I've got no oil in the oil pan in my car, I don't want my mechanic having me guessing as to whether I ought to drive my car with no motor oil in it. If I'm getting ready to go before a judge, I want my lawyer to explain to me in no uncertain terms what I can expect from this judge. So you, as attorneys, have an absolute ethical obligation to fully inform your client of everything that you can possibly share with your client.

MABERN WALL: My name is Mabern Wall. I'm a 2L here at the College of Law. And as a law student you have the opportunity to take many classes in a variety of different topics of law. But, to my knowledge, there may only be one class here that you can take in juvenile law, and I'm actually enrolled in it. Do you have any advice on how new lawyers – I guess a follow-up to John – can gain expertise in this area? And, like John, in a year I may be practicing in front of you all. How do you suggest we learn the basics of procedures that may actually take years for attorneys to?

JUDGE TIMOTHY IRWIN: Come up and hang around. It's real easy. Be there. If you want to work up there, show your face enough, we'll give you the cases. You need to be there. If you get a case appointed to you and you come up and do a good job and nobody sees you around, you might get another one when that long list comes up again. But if

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<sup>33</sup> TENN. RULES OF PROF'L CONDUCT R. 2.1 cmts. (2011).

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you're there and we've got to find a third attorney because Dad has shown up for a hearing and Mom has already got one appointed and there's already a guardian ad litem, and I have to make this hearing go, I can't continue it again. If you're out in that lobby and I send my case manager and I say, "Find me a lawyer," guess who they're going to find, if you're there. Or you can be in the courtrooms watching. You can come now. We welcome you to sit in the courtrooms and watch. Some attorneys come on truancy day and pick up cases and sit and watch. Some days you get one; some days you don't. But hang around, be visible, and be seen. Familiarize yourself with the court staff. Know the nine probation officers, the eight family service workers – that's the level that the cases get assigned – know the magistrates, and make sure they know you. You've got a distinctive name; it will be easy to remember. Get down there and get in front of people. That's how you get opportunities. Show me that you're interested, and I'll believe you after a while.

UNIDENTIFIED SPEAKER: Good afternoon. We've heard so much today about what certain resources are available for children as well as for parents who are having problems parenting. Is there any place in this state a similar handbook to the one that is put out by the Office on Aging for Senior Citizens that would actually point parents to resources before their children end up facing you three?

JUDGE TIMOTHY IRWIN: There is in this county. It's put out by the Compassion Coalition. That's the parent group. I'm not sure the name of it. But it's put out by the Compassion Coalition.

UNIDENTIFIED SPEAKER: Salt and Light.<sup>34</sup>

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<sup>34</sup> COMPASSION COALITION, SALT AND LIGHT GUIDEBOOK (3d ed. 2010).

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JUDGE TIMOTHY IRWIN: Salt and Light is the name of it. And it is faith-based organizations. But many of the organizations that serve our courts and our kids and families are faith-based. It's a great resource guide. I get one every year. If you're by, I'll be glad to let you borrow my copy. I think there is a small charge for them. It's a pretty thick detailed book. But the Compassion Coalition – and I don't have their number right off – but you could call Cokesbury<sup>35</sup> and ask how to get in touch with them and they could tell you for sure.

JUDGE DWIGHT STOKES: We have one in Sevier County too.<sup>36</sup> That is an excellent resource you're talking about. I'd like to add, too, that for anybody who wants to come to Sevier County, I have my address, phone number, and e-mail. If you'd like to come and participate in court or sit in on general sessions or juvenile, if you make arrangements, or if you want to come down and talk about the law, I'll be glad to. I've worked with Professor Rivkin, and he has that information. But I'll be glad for you to come by and spend some time talking about the profession, if you'd ever like to.

JUDGE TIMOTHY IRWIN: If you want to do that, make an appointment. But if you want to just come by and see court, there will always be one running, most all the time all of them are running, except for Dirk, he's kind of gotten a pass right now because he doesn't have a lot of business on the delinquent side. Are you all seeing that in Nashville, slowed down over there?

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<sup>35</sup> Cokesbury United Methodist Church, <http://www.cclive.org>.

<sup>36</sup> SEVIER CO. COMMUNITY RESOURCE GUIDE (2009), *available at* [http://www.sevier.org/PDF/crguide\\_2009.pdf](http://www.sevier.org/PDF/crguide_2009.pdf).

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MAGISTRATE JUDGE CARLTON LEWIS: Not really. I wish we were.

JUDGE TIMOTHY IRWIN: I'd like to take credit for that, but I don't know that we can. But our felonies are down from 650 two years ago to 223 this year, forty percent last year, twenty-eight percent last year. So good job. I think it's an endorsement of people that have been working with the kids in the community. Something good is going on. I'm not quite sure why. I just know that we're seeing the results. We could jump back up there this year, but who knows. But the other side of things is more than making up for it right now. Does everybody know where child support is? It's in the old courthouse here. Does everybody know that? Okay. Some of you do.

AUSTIN KUPKE: Hi. My name is Austin Kupke. I'm a 2L law student here at the University as well. And I was just wondering— and, Judge Stokes, you touched on this a little bit – what are your perceptions in your respective courtrooms of differing socioeconomic backgrounds and whether children show up with parents who have resources for them, or can afford private attorneys, versus those who cannot?

JUDGE DWIGHT STOKES: Do I start off with that?

JUDGE TIMOTHY IRWIN: She asked you.

JUDGE DWIGHT STOKES: Obviously, many times there is a tremendous lack of resources in this day and time; that's one reason I was emphasizing trying to get a handle on that, on the needs, and trying to look it up in advance. We have a very receptive staff at our juvenile court. They'll try to match anybody up – and I think these two judges have the same type things – but trying to match up with resources and get some. And we like to do a lot of



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prevention. In other words, if somebody does have issues like you're talking about and if they want to check out any resources through the juvenile court or get with us about some prevention services, those are very good. We try our best, like Tim talked about, you try your best to match up with resources and get anything available. But it is a challenge, and that's one reason that attorneys finding out the needs and finding out the strengths of families and where they'd like to go—we will try to help that in any way, even prior to the hearing date. The more we can put things in motion from the time of a charge or the time of something coming up, putting services in as promptly as possible, it can be of great assistance. But it's a challenge to do that. And there is a big difference in people that can go out and hire a very expensive attorney, and they can come in and say, “Well they've already been in rehab for X number of days and X number of months.” And with those that don't have those resources, it's a matter of trying to get on them as promptly as possible, and see what we can set in as far as mental health assessments and drug and alcohol assessments and try to get some services in, because we've had some success to getting those in early, even prior to hearings taking place.

MAGISTRATE JUDGE CARLTON LEWIS: And anytime there is a budget cut, social services are always the first victims, and among the social services, prevention services are the first to go. What I have been able to do occasionally is sort of leverage the Department of Children's Services. The Department of Children's Services has a responsibility to look for any less drastic alternative to custody, and I will frequently mention to a case manager, if there appear to be no other services available, that I am considering committing a child to the custody of the Department of Children's Services, and ask them if they would like to look for noncustodial services for the child or the family.

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Generally, noncustodial services are far less expensive to the Department than providing custodial services.

JUDGE TIMOTHY IRWIN: Often a good way to play the game – and you as attorneys can certainly be key players in that – you can go to the Department before the date of the case, say, “Look, I need some help, you're going to have another kid dumped on you in custody,” which they don't want. I promise you, they don't want. When it was possible to do this before the influx of TFACTS,<sup>37</sup> I was able to look on my computer and determine the number of Knox County children in State custody every day. And I looked at that number not to base my decisions on how many I had in there, but to remind myself that I'm in charge of a delicate resource. There are only so many beds out there; there's only so much money. There are only so many treatment centers and treatment beds, only so many foster families. We try to come up with solutions that avoid custody whenever possible. Columbus Home was reactivated. Columbus Home is the round building that's right next to court that's an assessment center where we hold children overnight or sometimes two or three days. They have to have a hearing after the first night they come in there. They're not in custody, they're being assessed, and while they're being assessed, we're looking for grandma and grandpa, aunt, or uncle. I'll be glad to share that resource with my neighbors in other counties, to tell them how we do it. We think it saves a lot of custody beds at a very good price. That's why that place is there. It's there to prevent kids from going through the trauma of custody when we've got somebody that's coming in from New York who's going to be suitable and we feel pretty good about. Sometimes we'll leave them in there ten days or two weeks. They go to their own schools. They get driven back and forth. They are well cared for. But it keeps us from having

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<sup>37</sup> Tennessee Family and Child Tracking System.

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a custody event. So we look at that. And DCS was a little shaky about it at first; it took some salesmanship. And they have embraced it and are quick to point out, "Well Columbus Home is empty; you know, we have room at Columbus Home," when you start facing them with custody. We're not omniscient because we get robes and we sit on a bench. Sometimes we don't know. And what a great deal for us to sit back and go, "Man, I get another day to figure out what to do with this kid." And sometimes you may be telling us one thing in our heart – that it's a good solution for everybody to have the extra time to wait. I think it could be used not so much as a model, not so much we're doing it right, but it could be used and shared with some other counties and I think it would greatly alleviate their burden. And I'll be glad to do that. And I'm waiting on an attorney to talk to a judge and say, "They have this place where they'll just hold them for a few days until you figure it out, can we use that?" And I certainly will talk to the people that run Columbus Home and see if they can't make that happen.

Also, we tried to get Magistrate Lewis's children at the time of the big flood; we tried to get them here in Knoxville. We have a beautiful detention facility. If you've never toured it, Mr. Bean<sup>38</sup> would be glad to give you a tour. It's really well run and well-maintained. It accommodates 120 kids. There are twenty-one in it today. We have a lot of empty beds. I think it's eighty boys and forty girls, or eighty and twenty right now, but there's room to expand to have twenty more and we just never needed it. But it's important you understand how that place works. Can you imagine – let me put this in perspective for you. This is something that blows my mind. Two brand-new rubber basketballs every month. In one month's time, the skin is worn off the basketballs. Think about that. I played with balls all my life on asphalt, and I don't ever recall

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<sup>38</sup> Richard Bean, head of the Richard L. Bean Juvenile Service Center.

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wearing one out. They wear out one a month back there. And I want you all to know that goat therapy is well and alive in Knox County Juvenile Court. If you don't know what I'm talking about, you haven't had the experience of having a very young child who needs to step out of court and go back and spend some time with my paralegal in our private petting zoo back behind. That started – I read a unique article about children that were paired with dogs from an animal shelter that weren't able to be adopted.<sup>39</sup> It was in New Mexico. And it was a wonderful program and it just warmed my heart. And I went in to Mr. Bean, and I said, “Richard, look at this.” An animal shelter, as you know, is just right next to juvenile court. I said, “Richard, go and let's talk to these people – I mean, we can put a kid with a dog, and the kids train the dogs, and the dogs train the kids, and it's an hour, you know, one night a week.” And the next Monday I went out and there were three goats in a pen. That's the truth. That is the honest truth. So, we do have goats at Knox County Juvenile Court.

JESSICA VAN DYKE: I don't know how to follow up with any story about goats. And I don't know if there are a lot of juvenile courts in the entire United States that have their own goats, so I think that really says something. I'm going to ask you all the same question I asked the last panel, and I think it's just the frustrations of parents that aren't parents and bad parenting – do you all have any advice for attorneys on how to handle parents or about observations or beliefs that maybe you hold that can help us who are going to be practicing in your courts and dealing with these people on a regular basis?

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<sup>39</sup> See Tami Harbolt and Tamara H. Ward, *Teaming Incarcerated Youth with Shelter Dogs for a Second Chance*, available at [http://www.animalsandsociety.org/assets/library/436\\_s925.pdf](http://www.animalsandsociety.org/assets/library/436_s925.pdf).

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JUDGE DWIGHT STOKES: How to deal with parents in general? I just think the main thing is to start off respecting them, trying to find out what they're all about, trying to find out as much as you can about their background. If you see strengths in their family, being able to emphasize those, and to find common ground. Not to be demeaning, to take the time to sound receptive, to be able to work with individual families and individuals, and just be generally interested and try to understand where people come from and the opportunities and the obstacles and some of the things that they're facing that we may never come close to facing. And sometimes you have some ground. But I think starting off that way, where you're genuinely interested, give them an opportunity to talk and speak without your having to say much, and let them get it out of their system, is a good gift to have. And then go from there.

PENNY WHITE: Does anyone have another question?

MAGISTRATE JUDGE CARLTON LEWIS: Let – okay. Go ahead.

PENNY WHITE: I'm sorry.

MAGISTRATE JUDGE CARLTON LEWIS: No, Judge White, I probably –

PENNY WHITE: No. Again, I've sat here all day and maintained silence and I'm going to do that for a little while longer.

MAGISTRATE JUDGE CARLTON LEWIS: The problem is, if somebody will shut me up, I'll get out of here without getting into trouble. But if you don't shut me up, I'm going to say –

PENNY WHITE: Bring it on.

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MAGISTRATE JUDGE CARLTON LEWIS: – something that I'm going to get in trouble for.

JUDGE TIMOTHY IRWIN: Let me respond to that young lady's question with: brutal honesty early. Three words: Brutal. Honesty. Early. Tell them. Nobody likes surprises. Tell them. Tell them exactly what they're up against and exactly what's going to happen. It's not like you don't know. I mean, you've seen it before. You can tell them, "This is our best shot, this judge is going to do this." Nobody keeps this – we haven't kept anything secret. We're doing it right out in the open. Oh, secrets. Secrets. I hate the fact that juvenile court doesn't have a court reporter down there full-time. I understand some other courts are losing their court reporters. You can walk up to my bench in plain view and set a tape recorder up there whenever you want. I don't want to be videoed – that's a personal preference – but I don't want to be sneak-recorded. I want it done in plain view. I want everybody to know about it. And if somebody makes a recording, it's shared by all. You can do that whenever you want. I think you're crazy not to do it. It wouldn't insult me a bit. Bring your recorder, set it right up there, and we'll treat it for what it's worth. At least it may give you accurate information with which to do your orders, if nothing else. It may be you're having that discussion with your client. The client says, "Well he said so and so," and you say, "No, he didn't," and you play it back. I think it's just good to protect you. I mean, you guys get a ton of Bar complaints that are unmerited. You've got a ton of really ticked-off parents that are mad at you, that say, "It's my lawyer's fault." And I think this is a great way to protect you, to show that you're zealous. And also, at least at the next de novo hearing in circuit court, that recording would get a lot of respect just like it does in sessions court. Everybody understands the economics. Nobody has the money to pay a court reporter on 31,000

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cases, but it won't hurt my feelings a bit. And I'm sure – I've never tried it in Sevier County but I doubt – if I told you about it, you'd probably be all right with it, wouldn't you?

JUDGE DWIGHT STOKES: Yeah, we do tape everything but –

JUDGE TIMOTHY IRWIN: Well, you're in sessions court a lot of the time and you have a tape running.

JUDGE DWIGHT STOKES: – Right. We do tape and all in juvenile court, but yeah, you can ask me about it in advance. We'll have one but it –

JUDGE TIMOTHY IRWIN: Again, don't surprise us. Don't surprise us. I learned I was being filmed about halfway through, and I wasn't a happy camper. It was a young lawyer and he had a very fancy-looking recorder I thought it was a telephone. But it wasn't – it was going, it was recording. But we took care of it. He brought it back there and we erased it. He showed me how he did it, but it still was uncomfortable.

PENNY WHITE: Judge Lewis, really –

MAGISTRATE JUDGE CARLTON LEWIS: I'm okay.

PENNY WHITE: I just want to tell you what a privilege it has been to hear all the panelists today and, an even greater privilege, to work with the student members of the *Tennessee Journal of Law and Policy* who I quasi-advise. So I'd like for all of the student members of the Policy Journal to stand up and be recognized and thanked by this audience, please. (Applause). There usually aren't that many students total in this building at four-forty-five p.m. on a Friday afternoon. They have worked their socks off, their hearts out. They have been so passionate about this.

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And I've been saying all day long, "No symposium next year, I'm so tired, no symposium." But after a turnout like this and a day like today, it would be very hard not to let them fly and soar again next year the way that they've done this year. So I want to thank everyone for coming, and especially hats off to the Journal staff. And I think John has a final presentation.

JOHN EVANS: Yeah. We want to present you guys with a couple of little mementos you can take with you. Just one more round of applause for our final panel. (Applause) I've just got a couple of quick announcements before we let you guys go. We'd also like to recognize – I said it earlier but we didn't really do it as much as we needed to – Jessica Van Dyke is our symposium editor. I don't think there's anybody else in this planet that has put more into this symposium than her. Basically since the idea was formed, she's done everything from name tags, to materials, to calling the speakers, just pretty much everything all around to make sure this happens. Professor White went ahead and got her some flowers. We just want to present that to her. (Applause) Thank you again for coming. We really appreciate it. Have a good rest of the evening. (Whereupon the symposium was concluded).



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### ESSAY

#### **IS PARENTING AUTHORITY A USURPATION OF JUDICIAL AUTHORITY? HARMONIZING AUTHORITY FOR, BENEFITS OF, AND LIMITATIONS ON THIS LEGAL-PSYCHOLOGICAL HYBRID**

*Joi T. Montiel*<sup>1</sup>

### ABSTRACT

A “Parenting Coordinator” assists high-conflict parents in resolving disputes that arise in the parents’ efforts to jointly parent their children after a divorce. The Parenting Coordinator simultaneously educates the parents to minimize the degree and frequency of future conflict. While Parenting Coordination is not mediation or arbitration, it is also not counseling. Instead, Parenting Coordination is a “legal-psychological hybrid.”

A trial court’s delegation to a parenting coordinator to determine a fit parent’s access to her child is arguably an improper delegation of judicial authority. While thirteen states have comprehensive schemes setting out their Parenting Coordination programs, other states are utilizing Parenting Coordination without statutory or rule-based authorization. Appointments without statutory or rule-based authority are particularly vulnerable to challenge.

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<sup>1</sup>Assistant Professor of Law, Director of Legal Writing Program, Faulkner University, Jones School of Law. The author would like to thank Faulkner University, Jones School of Law, for providing a grant to support this project; Dean Brenda See for her mentorship and encouragement; Assistant Professors Jocelyn Hedlund-Limmer and Eric P. Voigt for their valuable feedback on this Article; Stephanie Stephens for her research support; and Dr. Karl Kirkland for generously sharing his work on this issue.

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Whether a Parenting Coordinator's appointment is an improper delegation of judicial authority depends on the authority for the appointment in the given jurisdiction and the terms governing the specific appointment. This Article analyzes the use of Parenting Coordination in jurisdictions that appoint Parenting Coordinators both with and without specific authority. From that analysis, this Article offers a paradigm for constructing an appointment that does not constitute an improper delegation of judicial authority. The paradigm will be useful for judges and practitioners attempting to utilize Parenting Coordination without specific statutory or rule-based authority. It will also be useful for courts and legislators considering adoption of a Parenting Coordinator rule or statute.

The Article proposes that, where a trial court has some inherent authority to ensure the best interest of the children, with or without specific statute or rule-based authority, Parenting Coordination can be sustained. Combined with the substantial benefits of a qualified Parenting Coordinator, imposing appropriate limitations on the Parenting Coordinator's role can incrementally diminish the argument that the appointment is an improper delegation of judicial authority. Achieving an appropriate balance of benefits and limitations, in light of the basis for appointment authority, achieves a sustainable appointment.

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### I. Introduction

A Parenting Coordinator assists high-conflict parents in resolving disputes that arise in the parents' efforts to jointly parent their children after a divorce. The Parenting Coordinator also educates the high-conflict parents to minimize the degree and frequency of future conflict. Parenting Coordination is not mediation or arbitration, or counseling. Instead, Parenting Coordination is a "legal-psychological hybrid."<sup>2</sup> Because it does not fit into a category of familiar extra-judicial roles, Parenting Coordination is subject to challenge as being an improper delegation of judicial authority.<sup>3</sup>

Whether appointing a Parenting Coordinator is an improper delegation of judicial authority depends on the authority for the appointment in the given jurisdiction and the terms governing the specific appointment. Although thirteen states have adopted court rules or statutes authorizing the appointment of a Parenting Coordinator,<sup>4</sup> courts in many states are appointing Parenting Coordinators without authority from a statute or court rule.<sup>5</sup> This Article analyzes the use of Parenting Coordination in jurisdictions that appoint Parenting Coordinators both with and without specific authority. From that analysis, this Article offers a paradigm for constructing an appointment that does not constitute an improper delegation of judicial authority. The

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<sup>2</sup> Karl Kirkland & Matthew J. Sullivan, *Parenting Coordination (PC) Practice: A Survey of Experienced Professionals*, 46 FAM. CT. REV. 622, 633 (2008); Matthew J. Sullivan, *Ethical, Legal, and Professional Practice Issues Involved in Acting as a Psychologist Parent Coordinator in Child Custody Cases*, 42 FAM. CT. REV. 576 (2004).

<sup>3</sup> Association of Family and Conciliation Courts ("AFCC"), *Parenting Coordination: Implementation Issues*, 41 FAM. CT. REV. 533 (2003) [hereinafter AFCC, *Implementation Issues*]; Christine A. Coates et al., *Parenting Coordination for High-Conflict Families*, 42 FAM. CT. REV. 246, 249-50 (2004).

<sup>4</sup> See *infra* note 28.

<sup>5</sup> See *infra* note 29.

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paradigm will be useful for judges and practitioners who are utilizing Parenting Coordination without specific statutory or rule-based authority. It will also be useful for courts and legislatures that are considering adopting a Parenting Coordinator rule or statute.

### II. Background and Summary

Parents have due process rights to make decisions about their children under the Fourteenth Amendment.<sup>6</sup> However, based on the doctrine of *parens patriae*, the state may in certain instances permissibly invade the otherwise high walls of the family in the best interest of the children. Given the parents' submission to a court's jurisdiction in a divorce proceeding, it is accepted that a trial court judge will make decisions regarding the parents' access to their children. However, when the trial court judge delegates the power to determine a fit parent's access to her child to a third party such as a lawyer or a psychologist who has not been selected in the same manner that a member of the judiciary has been selected,<sup>7</sup> the decision-making by that third-party delegate raises concern.

Nevertheless, when parties divorce, people other than the judge, the parents, their lawyers, and the children frequently become involved in the process. For example, the court may appoint a guardian ad litem, special master, custody evaluator, or mediator. Courts frequently delegate

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<sup>6</sup> Troxel v. Granville, 530 U.S. 57, 66 (2000) (“[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”).

<sup>7</sup> See Salt Lake City v. Ohms, 881 P.2d 844, 851 (Utah 1994) (stating that non-judges cannot properly be assigned core judicial duties because “[t]here are no provisions which subject them to the constitutional checks and balances imposed upon duly appointed judges of courts of record.”).

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what might appear to be judicial functions, even decision-making authority, to such third parties.

A relatively new third-party delegee is the Parenting Coordinator.<sup>8</sup> A Parenting Coordinator assists high-conflict parents after their divorce in resolving disputes that arise in implementing the parenting aspect of their divorce judgment. Parenting Coordinators also educate the parents to minimize the degree and frequency of future conflict. The Association of Family and Conciliation Courts (“AFCC”) defines Parenting Coordination as:

[A] child-focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high-conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about their children’s needs, and with prior approval of the parties and/or the court,

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<sup>8</sup> Although the role of a Parenting Coordinator is somewhat similar across jurisdictions, the nomenclature used in the various jurisdictions has “almost been one for each different jurisdiction.” Karl Kirkland, *Parenting Coordination (PC) Laws, Rules, and Regulations: A Jurisdictional Comparison*, 5 J. OF CHILD CUSTODY 25, 28 (2008) [hereinafter Kirkland, *PC Laws, Rules and Regulations*]. The AFCC has noted that a Parenting Coordinator may be called a “special master” in California, a “med-arbiter” in Colorado, a “wise person” in New Mexico, a “custody commissioner” in Hawaii, to list a few. AFCC, *Implementation Issues*, *supra* note 3, at 534 n.3. This difference in nomenclature has been recognized as a problem; inconsistent nomenclature has been found to be a risk for board complaints and civil lawsuits against the Parenting Coordinator, presumably because the inconsistency causes parties to misunderstand the role. Karl Kirkland & Kale E. Kirkland, *Risk Management and Aspirational Ethics for Parenting Coordinators*, 3 J. OF CHILD CUSTODY 23, 30-31 (2008) (in a section of the article cleverly entitled “A Rose by any other name does not smell as sweet”). The AFCC Parenting Coordination study group has recommended the use of the term “Parenting Coordinator.” *Id.* (citing AFCC, *Implementation Issues*, *supra* note 3, at 533).

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making decisions within the scope of the court order or appointment contract.<sup>9</sup>

Although it might be viewed as an alternative dispute resolution process, Parenting Coordination is not mediation or arbitration. It is also not counseling. Parenting Coordination is a “legal-psychological hybrid.”<sup>10</sup> Because the role of a Parenting Coordinator does not conform to the role of any familiar extra-judicial delegee such as a mediator or special master, Parenting Coordination is subject to challenge as being an improper delegation of judicial authority lacking legislative authority,<sup>11</sup> particularly where no statute or court rule specifically authorizes the appointment of a Parenting Coordinator.

While thirteen states have comprehensive schemes setting out their Parenting Coordination programs,<sup>12</sup> other states are utilizing Parenting Coordination without statutory or rule-based authorization.<sup>13</sup> The results of implementing a Parenting Coordination program on such an ad hoc basis are inefficient testing of the legality of Parenting Coordination<sup>14</sup> and inconsistent use of Parenting

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<sup>9</sup> AFCC Task Force on Parenting Coordination, *Guidelines for Parenting Coordination*, 44 FAM. CT. REV. 164, 165 (2006) [hereinafter AFCC, *Guidelines*].

<sup>10</sup> Kirkland & Sullivan, *supra* note 2, at 633; Matthew J. Sullivan, *supra* note 2, at 576.

<sup>11</sup> Coates et al., *supra* note 3, at 249-50; AFCC: *Implementation Issues*, *supra* note 3, at 533.

<sup>12</sup> See *infra* note 28.

<sup>13</sup> See *infra* note 29.

<sup>14</sup> A leader in the Parenting Coordination movement and an attorney in Oklahoma, the first state to pass a Parenting Coordination law, noted that in the process of developing a Parenting Coordination program in Oklahoma, they realized that they had to have a new law to legally do what they were trying to do. Without a new law allowing for a Parenting Coordinator, a court cannot delegate decision-making authority to a third party that invades the “high walls of the family.” Kirkland, *PC Laws, Rules and Regulations*, *supra* note 8, at 29.



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Coordination, thus diminishing the perceived and actual utility of Parenting Coordination.<sup>15</sup> Parenting Coordination, properly utilized, provides substantial benefits for dueling divorced parents, their children, and the court system. However, if Parenting Coordination is hastily implemented on an ad hoc basis – without fully considering the basis for the authority and the proper limitations on the role – confusion among parties, practitioners, and courts will result,<sup>16</sup> the “brand”<sup>17</sup> of Parenting Coordination will be damaged, and the opportunity to reap the benefits from Parenting Coordination will be lost. Thus, the paradigm

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<sup>15</sup> Elayne E. Greenberg, *Fine Tuning the Branding of Parenting Coordination*: “. . . You May Get What You Need,” 48 FAM. CT. REV. 206, 206 (Jan. 2010) (asking how Parenting Coordination professionals might address the “cacophony of discordant expectations and disparate practices about parenting coordination that are eroding the integrity of the parenting coordination process”). *But see* Karl Kirkland, *Positive Coping Among Experienced Parenting Coordinators: A Recipe for Success*, 7 J. OF CHILD CUSTODY 61, 64 (2010) [hereinafter Kirkland, *Positive Coping*] (opining that the diversity of experience “ultimately benefits the larger practice community” by providing learning opportunities through the comparison of the varying practices but also recognizing that there should be “movement toward greater uniformity” in the practice of Parenting Coordination).

<sup>16</sup> Leslie Ellen Shear, *In Search of Statutory Authority for Parenting Coordination Orders in California: Using a Grass-roots, Hybrid Model Without an Enabling Statute*, 5 J. OF CHILD CUSTODY 88, 91 (2008) (stating that appointment of a Parenting Coordinator “requires clear, highly-detailed ground rules, so that the litigants and a non-lawyer PC will understand them, know what to expect, and understand the waivers of formal due process rights”). “Litigation and appeals to resolve ambiguities, inconsistencies and uncertainties about the scope of the PC’s authority . . . will defeat the purposes of the appointment.” *Id.* It has been suggested to the author by practicing attorneys that they and their clients are reluctant to object to the appointment of a Parenting Coordinator for fear of alienating the Parenting Coordinator whose decisions will be so vital to the parties’ relationships with their children.

<sup>17</sup> Greenberg, *supra* note 15, at 209.

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offered in this Article should be carefully considered in advance of an appointment.

This Article proposes that a trial court can use Parenting Coordination, without a Parenting Coordination statute or court rule, in circumstances where a trial court has some inherent authority to ensure the best interest of the children. Combined with the substantial benefits of a qualified Parenting Coordinator, imposing appropriate limitations on the Parenting Coordinator's role can incrementally diminish the argument that the appointment is an improper delegation of judicial authority. In light of the basis for appointment authority, reaching an appropriate balance of benefits and limitations achieves a sustainable appointment.

Part III of this Article acknowledges the argument that Parenting Coordination might constitute an improper delegation of judicial authority. Part IV of this Article recognizes that lack of statutory or rule-based authority for the appointment poses an additional obstacle for Parenting Coordination. However, even where authority for the appointment is somewhat lacking, Parenting Coordination is defensible if appropriately limited because of the benefits it bestows.

The benefits of Parenting Coordination are discussed in Part V. In determining the sustainability of a Parenting Coordination appointment, the benefits that Parenting Coordination can provide must be accorded due weight. Most importantly, Parenting Coordination benefits the children of high-conflict parents. Exposure to conflict is one of the most detrimental factors in a child's post-divorce development, and it is the State's duty to ensure the furtherance of the best interest of those children. Second, Parenting Coordination benefits the judicial system by preventing the trial court from becoming a revolving door for the high-conflict parents that Parenting Coordination serves. Third, Parenting Coordination benefits the high-conflict parents themselves by providing a timely and cost-

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effective means of dispute resolution that also educates the parents in ways to avoid or resolve conflict on their own in the future.

Significantly, as discussed in Part VI of this Article, a Parenting Coordinator must have adequate qualifications so that he can provide the benefits referenced above. Those benefits may be realized only when the Parenting Coordinator has adequate qualifications to serve in the “legally-psychological hybrid” role of a Parenting Coordinator. If the Parenting Coordinator does not have adequate qualifications, the proposition of this Article does not hold true. The Parenting Coordinator’s ability to provide benefits are a significant part of the equation: benefits of Parenting Coordination combined with limitations on Parenting Coordination overcome the arguments against Parenting Coordination considered here.

Limitations on Parenting Coordination are discussed in Parts VII through X of this Article. These limitations on Parenting Coordination abate the argument that the appointment is an improper delegation of judicial authority. First, as addressed in Part VII, a Parenting Coordinator should be appointed only after a trial court has entered a custody order, and the Parenting Coordinator’s role should therefore be limited to disputed issues regarding implementation of that trial court’s order. Second, as discussed in Part VIII, a Parenting Coordinator should be appointed only under certain conditions, such as consent of the parties or a trial court finding that the parents are “high conflict,” so that the appointment is in the best interest of the children who would be otherwise exposed to chronic conflict. Third, as discussed in Part IX, a Parenting Coordinator’s decision, if he has decision-making authority, should always be subject to review by the appointing court. Thus, the trial court retains its judicial authority. As addressed in Part X, Parenting Coordination can be even further limited by allowing a Parenting Coordinator to decide only minor issues, which might be

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specified by the appointing court or by court rule or statute, where there is one. Some jurisdictions further limit the instances in which a Parenting Coordinator may have decision-making authority by requiring that the parties specifically consent to the Parenting Coordinator's decision-making authority, a step further than consent to the appointment, before the Parenting Coordinator may have that authority.

Combined with the substantial benefits of a qualified Parenting Coordinator, imposing appropriate limitations on the Parenting Coordinator's role can incrementally diminish the argument that the appointment is an improper delegation of judicial authority, and a sustainable appointment can be achieved even without a Parenting Coordinator statute or court rule.

### III. Problem: Delegation of Judicial Authority

Powers of a court are generally nondelegable.<sup>18</sup> A

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<sup>18</sup> See, e.g., *Morrow v. Corbin*, 62 S.W.2d 641, 645 (Tex. 1933) (“[T]he power thus confided to our trial courts must be exercised by them as a matter of nondelegable duty, that they can neither with nor without the consent of parties litigant delegate the decision of any question within their jurisdiction, once that jurisdiction has been lawfully invoked. . . .”); *Salt Lake City v. Ohms*, 881 P.2d 844, 851 (Utah 1994) (stating that non-judges cannot properly be assigned core judicial duties because “[t]here are no provisions which subject them to the constitutional checks and balances imposed upon duly appointed judges of courts of record”); *In re S.H.*, 3 Cal. Rptr. 3d 465, 471 n.11 (Cal. Ct. App. 2003) (“Under the separation of powers doctrine judicial powers may not be completely delegated to, or exercised by, either nonjudicial officers or private parties.”) (citing Cal. Const., art. II, § 3 and Cal. Const. art. VI, § 1); *State Farm Mut. Auto. Ins. Co. v. Kendrick*, 780 So. 2d 231, 233 (Fla. Dist. Ct. App. 2001) (“A trial court cannot delegate the sole authority to perform ‘a purely judicial function.’”) (citing *Larson v. State*, 572 So.2d 1368, 1371 (Fla. 1991)); *D’Agostino v. D’Agostino*, 54 S.W.3d 191, 200 (Mo. Ct. App. 2001) (“A court cannot delegate or abdicate, in whole or in part, its judicial power.”) (citing *S.K.B. v. J.C.B.*, 867 S.W.2d 651, 658 (Mo. Ct. App.

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trial court's authority is "constrained by the basic constitutional principle that judicial power may not be delegated."<sup>19</sup> However, a trial court may properly delegate certain limited functions.<sup>20</sup> Although a state's constitution may generally prohibit the delegation of judicial authority, the delegation of *some* authority to a third party may be permissible or even necessary in some instances.<sup>21</sup>

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1993)); *Tabor v. Hogan*, 955 S.W.2d 894, 897 (Tex. Ct. App. 1997) ("Those enumerated powers are non-delegable[;] [s]imply put, the trial judge may not relinquish them to others.").

<sup>19</sup> *Ruisi v. Thieriot*, 62 Cal. Rptr. 2d 766, 772 (Cal. Ct. App. 1997).

<sup>20</sup> While a core judicial function cannot be delegated, other duties might be properly delegated; the courts may receive assistance from others in performing core judicial functions. "The term 'judicial power of courts' is generally understood to be the power to hear and determine controversies between adverse parties and questions in litigation;" the nondelegable judicial powers include the authority to hear and determine justiciable controversies, the authority to enforce a valid judgment, and the power necessary to "protect the fundamental integrity of the judicial branch." *In re Adoption of E.H.*, 103 P.3d 177, 182 n.7 (Utah Ct. App. 2004) (quoting *Ohms*, 881 P.2d at 181-82 n.6); see also *Morrow*, 62 S.W.2d at 645 n.17. However, core judicial functions, "do not include functions that are generally designed to 'assist' courts, such as conducting fact finding hearings, holding pretrial conferences, and making recommendations to judges." *State v. Thomas*, 961 P.2d 299, 302 (Utah 1998) (quoting *Ohms*, 881 P.2d at 851 n.17).

<sup>21</sup> *In re J.S.P.*, 278 S.W.3d 414, 422 (Tex. Ct. App. 2008) ("We recognize that under our Constitution, once the jurisdiction of the court has been invoked, it is the trial judge who possesses the judicial power to hear cases, decide disputed issues of fact and law, enter a judgment in accordance with the facts and the law, and enforce its judgment once entered. . . . While we cannot, and do not, condone a wholesale delegation of judicial authority . . . we recognize that there are limited circumstances . . . where delegation of some authority to a third party may be necessary . . ."). The court pointed out, however, that the trial court's ability to delegate is not limitless. *Id.*; see also, e.g., *In re Donovan*, 68 Cal. Rptr. 2d 714, 716 (Cal. Ct. App. 1997) (stating "[a]lthough a court may base its determination of the appropriateness of visitation on input from therapists, it is the court's duty to make the actual determination" and holding that an order providing that the

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Thus, Parenting Coordination is subject to challenge as an improper delegation of judicial authority that lacks legislative authority, because it does not “fit” within the parameters of familiar extra-judicial roles. The process varies across the jurisdictions utilizing Parenting Coordination. Different jurisdictions may delegate different types of duties to a Parenting Coordinator.<sup>22</sup> In addition, jurisdictions may tolerate delegations of judicial authority to varying degrees.<sup>23</sup> Thus, a trial court’s appointment of a Parenting Coordinator in any jurisdiction raises the question of whether the appointment violates the general principles regarding delegation of judicial authority applicable in that state.<sup>24</sup> Below, this Article addresses the

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father have “no visitation rights without permission of minors’ therapists” was an improper delegation of judicial authority). A court delegating some authority must nevertheless be more than a reviewing court. *Russell v. Thompson*, 619 P.2d 537, 539 (Nev. 1980) (holding, where the trial court gave the master the authority to find facts and decide substantially all issues in the case, the trial court’s function has been reduced to that of a reviewing court and thus was an “abdication by a jurist of his constitutional responsibilities and duties”).

<sup>22</sup> See *infra* Part IX and note 155 (Parenting Coordination statutes and rules in Arizona, Colorado, Florida, Idaho, North Carolina, and Oklahoma allow for decision making by the Parenting Coordinator, while Parenting Coordination statutes and rules of Louisiana, Oregon, Texas, and Vermont do not allow for decision-making authority).

<sup>23</sup> See Coates et al., *supra* note 3, (“The degree to which [Parenting Coordination] is seen as a usurpation of the court’s inherent decision-making authority depends on a jurisdiction’s interpretation of applicable laws and the local legal culture. The more that third-party professionals (e.g., evaluators, mediators, therapists, special masters, and referees) are looked to for assessment of a family’s situation and relied on for recommendations as to “best interest” determinations, the more likely the PC model will be accepted as yet another valuable intervention at the court’s disposal to assist in dispute resolution.”).

<sup>24</sup> The AFCC Guidelines also recognize that a Parenting Coordinator’s exercise of decision-making authority – by court order or consent – could be statutorily or constitutionally impermissible in the given jurisdiction. AFCC, *Guidelines*, *supra* note 8, at 172. (“The scope of the PC’s decision-making authority may be limited in some

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issues to be considered in answering that question. The answer will depend on (1) the source of the trial court's authority to make the appointment, which is discussed in Part IV, (2) the benefits to be bestowed by the appointment, which are discussed in Part V and VI, and (3) whether the role is properly limited, which is discussed in Parts VII through X. An appropriate combination of authority and limitation can withstand an argument that Parenting Coordination is an improper delegation of judicial authority.

### IV. Problem and Possible Solutions: Finding Authority to Appoint the Parenting Coordinator

Parenting Coordination is “an ADR activity.”<sup>25</sup> However, it is not mediation and it is not arbitration. It cannot be understood as anything other than a hybrid role combining aspects of familiar alternative dispute resolution processes and adding a dose of education, or counseling.<sup>26</sup> Thus, Parenting Coordination does not “fit” within the parameters of familiar legal processes.<sup>27</sup> Thirteen states

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jurisdictions by constitutional law or statute. A PC should be knowledgeable about governing law and procedure in the PC's jurisdiction regarding decision-making or arbitration by the PC.”)

<sup>25</sup> Kirkland & Sullivan, *supra* note 2, at 633.

<sup>26</sup> Although a Parenting Coordinator is often a psychologist, “PC is not therapy.” *Id.* (explaining that Parenting Coordination is distinct from psychotherapy in many respects). One Parenting Coordinator stated: “As a PC, I’m a junior judge, not an evaluator or a therapist.” *Id.* at 629 (quoting a Parenting Coordinator who holds a J.D. and a Ph.D.). Perhaps most significant for the instant purposes is that, in Parenting Coordination, the focus of the service is on the best interests of the children and on reorganized family; it is not on any one of the parents seeing the Parenting Coordinator. *See id.*

<sup>27</sup> Shear, *supra* note 16 (explaining statutory schemes such as those for mediation, child custody evaluation, child custody counseling, and judicial reference have specific and mutually exclusive requirements and therefore cannot be merged to create the Parenting Coordination model).

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have adopted statutes or court rules permitting Parenting Coordination, some with and some without decision-making authority.<sup>28</sup> At least ten states, however, are utilizing Parenting Coordination without specific authority.<sup>29</sup> Where the Parenting Coordinator's role is completely dependent on a court order – that is, where

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<sup>28</sup> Arizona: ARIZ. R. FAM. L. PROC. 74; Colorado: COLO. REV. STAT. ANN. §§ 14-10-128.1, 128.3 (West 2010); Florida: FLA. STAT. ANN. § 61-125 (West 2010); Idaho: IDAHO CODE ANN. § 32-717D (2010); IDAHO R. CIV. P. 16(l)(3); Louisiana: LA. REV. STAT. ANN. § 9:358:1 (2010); Maine: ME. REV. STAT. ANN. tit. 19-A, § 1659 (2009); Minnesota: MINN. STAT. ANN. § 518.1751 (West 2010); North Carolina: N.C. GEN. STAT. ANN. § 50-91 (West 2010); Oklahoma: OKLA. STAT. ANN. tit. 43, § 120.1 (West 2010); Oregon: OR. REV. STAT. ANN. § 107.425 (West 2010); Texas: TEX. FAM. CODE ANN. § 153.605 (Vernon 2009); Vermont: VT. FAM. P.R. 4(s); West Virginia: W. VA. CODE ANN. § 48-9-208 (West 2010).

<sup>29</sup> It is difficult to ascertain precisely how many states are using Parenting Coordination without statutory or rule based authority because, in a jurisdiction utilizing Parenting Coordination, there may not be published decisions reflecting the appointment and, even if there are published decisions reflecting the use of Parenting Coordination, those decision are not easily identifiable if the decision does not use the term “Parenting Coordinator.” See Kirkland, *PC Laws, Rules and Regulations*, *supra* note 8, at 28, regarding inconsistent nomenclature. However, ten states utilize Parenting Coordination with specific statutory or rule-based authority authorizing the appointment of a Parenting Coordinator. Alabama: G.R.V. v. M.V., 825 So. 2d 116, 118 (Ala. Civ. App. 2001); California: Shear, *supra* note 16, at 90 (referencing California's then-fourteen years of experimentation with Parenting Coordination without enabling legislation); Delaware: D.W. v. R.E., No. CN07-03739, 2009, WL 6303016 (Del. Fam. Ct. July 28, 2009); Illinois: *In re C.N.*, 752 N.E.2d 1030 (Ill. 2001); Indiana: Higginbotham v. Higginbotham, 822 N.E.2d 609 (Ind. Ct. App. 2004); Kentucky: Telek v. Bucher, No. 2008-CA-002149-ME, 2010 WL 1253473 (Ky. Ct. App. April 2, 2010); Nevada: Pierce v. Ciccarone, No. 52515, 2008 WL 6124780 (Nev. Dec. 18, 2008); New York: L.S. v. L.F., 803 N.Y.S.2d 881 (Sup. Ct. 2005); Pennsylvania: Yates v. Yates, 963 A.2d 535 (Pa. Super. Ct. 2008); Tennessee: Nesbitt v. Nesbitt, No. M2006-02645-COA-R3-CV, 2009 WL 112538 (Tenn. Ct. App. Jan. 14, 2009).



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there is no statute or rule that provides for its appointment – the question is whether the court has the authority to order the appointment. Can that authority be based on existing laws permitting a trial court to send a matter to mediation or arbitration, or to appoint a special master? Can that authority be based on a trial court’s inherent authority? These questions make Parenting Coordination vulnerable to challenge as an unauthorized delegation of judicial authority.

Parenting Coordination borrows aspects of different extra-judicial devices that trial courts are authorized to utilize. For example, a Parenting Coordinator assists parties in an attempt to “mediate” a dispute and, when he makes a decision, acts similar to an arbitrator or special master. However, a Parenting Coordinator differs from a mediator, arbitrator, or a special master in fundamental ways. Thus, statutes and court rules that authorize a trial court’s use of those alternative devices do not necessarily authorize a trial court’s use of Parenting Coordination.<sup>30</sup>

If a Parenting Coordinator is appointed under a statute or rule authorizing some other process, the Parenting Coordinator will and should be expected to adhere to the procedures prescribed by the authorizing statute or rule; and if he does not, will be subject to allegations that he has violated the statute or rule that served as the ostensible basis for the appointment.<sup>31</sup> At the

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<sup>30</sup> A leader in the Parenting Coordination movement and an attorney in Oklahoma, the first state to pass a Parenting Coordination law, noted that in the process of developing a Parenting Coordination program in Oklahoma, they realized that they had to have a new law to legally do what they were trying to do. Without a new law allowing for a parenting coordinator, a court cannot delegate decision-making authority to a third party that invades the “high walls of the family.” AFCC, *Implementation Issues*, *supra* note 3, at 537.

<sup>31</sup> Shear, *supra* note 16, at 92 (explaining that the practice of invoking laws governing or processes such as mediation as the basis for authority for Parenting Coordination “opens the door to court challenges on the grounds of non-compliance with the governing law for each of those

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same time, if the Parenting Coordinator does adhere to the procedures prescribed by a statute that authorizes mediation or arbitration, for example, he is not conducting Parenting Coordination with all of its benefits.<sup>32</sup> Furthermore, qualifications that are needed in a Parenting Coordinator differ from qualifications required for other roles such as mediator, arbitrator, or special master. For these reasons, a Parenting Coordination appointment should not rest on statutes authorizing a trial court to utilize other processes such as mediation, arbitration, or reference to a special master. Problems in relying on such statutes are examined more closely below in Parts A, B, and C. In addition, as discussed in Parts D and E, other potential sources of authority exist that can support the appointment of a Parenting Coordinator.

### A. Statutes and Rules Authorizing Mediation as Potential Sources of Authority for Parenting Coordination

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models”). *See, e.g.,* *Heinonen v. Heinonen*, 14 P.3d 96, 98-99 (Or. Ct. App. 2000) (rejecting the idea that the delegation of authority to the Parenting Coordinator was a permissible form of mediation because the mediation statute did not authorize a trial court to delegate authority to a mediator to make a binding ruling “against the wishes of one of the parties”).

<sup>32</sup> He also risks accusations of legal and ethical violations due to confusion about the varying. *See* Kirkland, *PC Laws, Rules and Regulations*, *supra* note 8, at 28 (“Inappropriate and inconsistent use of titles and functions in this arena has been found to be a major risk for board complaints and civil lawsuits.”) (citing Kirkland, et al., *Quasi-Judicial Immunity for Forensic Mental Health Professionals in Court-Appointed Roles*, 3 J. OF CHILD CUSTODY 1 (2006)); *see also* Sullivan, *supra* note 2, at 576 (explaining that the lack of coordination of review processes creates a “minefield of professional risk” for a psychologist servicing as a Parenting Coordinator). In addition, if Parenting Coordination is hastily implemented on an ad hoc basis, the “brand” of Parenting Coordination is subject to damage, and the opportunity to reap the benefits to be gained from Parenting Coordination will be lost. Greenberg, *supra* note 15, at 209.

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Statutes or rules of court that authorize a trial court to order mediation should not be construed to also approve of Parenting Coordination.<sup>33</sup> Of course, where a Parenting Coordinator has decision-making authority, statutes authorizing mediation, which do not allow for decision-making by a mediator, cannot be the basis for the authority.<sup>34</sup> Even where a Parenting Coordinator does *not* have decision-making authority, a mediation statute is not a sound basis for authority to appoint a Parenting Coordinator.<sup>35</sup> The processes of mediation and Parenting Coordination are fundamentally different. A Parenting Coordinator's role is similar to that of a mediator in that the goal is to facilitate the parties' mutual agreement regarding the resolution of a given dispute.<sup>36</sup> The methods by which those disputes are resolved are also somewhat similar. Parties typically communicate *ex parte* with a mediator in mediation and with a Parenting Coordinator in Parenting Coordination in an effort to reach a mutual agreement.<sup>37</sup>

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<sup>33</sup> *Heinonen*, 14 P.3d at 98 (rejecting the argument that the delegation of authority to the Parenting Coordinator was a permissible form of mediation and recognizing that the statutes contemplated mediation to resolve parenting time and visitation issues but that they did not authorize a trial court to delegate authority to a mediator to make a binding ruling "against the wishes of one of the parties.") (citing OR. REV. STAT. ANN. § 765(1) (West 2010)). *See also* Shear, *supra* note 16, at 94 (explaining that invoking a mediation statute as the basis for authority to appoint a Parenting Coordinator is "problematic" because, among other things, mediation is confidential).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> AFCC, *Guidelines*, *supra* note 9, at 165 ("Parenting coordination is a child-focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner. . . .").

<sup>37</sup> AFCC, *Guidelines*, *supra* note 9, at 170-71 (stating in Guideline X that "[b]ecause parenting coordination is a non-adversarial process designed to reduce acrimony and settle disputes efficiently, a PC may engage in *ex parte* (individual) communications with each of the parties

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However, the roles are significantly different with regard to reporting to the court about the results of the process. Mediation of child custody matters is generally confidential.<sup>38</sup> A mediator typically may not report to the court any information beyond whether the matter was settled through the mediation process. In contrast, Parenting Coordination is not confidential; the Parenting Coordination may file reports with the court or even be called to testify.<sup>39</sup> Because of these fundamental differences between mediation and Parenting Coordination, statutes or rules of court that have authorized a trial court to utilize mediation cannot be construed to also approve of a fundamentally different process of Parenting Coordination.<sup>40</sup>

### B. Statutes or Rules Authorizing Appointment of a Special Master as Potential Sources of Authority for Appointing a Parenting Coordinator

To the extent that a Parenting Coordinator does make recommendations to the court or decisions in the parties' dispute, his role might be compared to that of a

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and/or their attorneys, if specified in writing in the order of appointment, PC agreement or stipulation").

<sup>38</sup> Carrie-Anne Tondo, et al., *Mediation Trends: A Survey of the States*, 39 FAM. CT. REV. 431, 433 (2001).

<sup>39</sup> Kirkland, *PC Laws, Rules and Regulations*, *supra* note 8, at 42 (explaining that this "reporting back to the court feature" distinguishes Parenting Coordination from mediation and is the "teeth" that compels the parties to respect the Parenting Coordination process).

<sup>40</sup> Authority for ordering mediation is particularly weak as a source for ordering Parenting Coordination if the trial court seeks to appoint a Parenting Coordinator with decision-making authority. Mediators do not make decisions. *See id.* ("Unlike mediation, PC includes investigative, probative, evaluative, reporting, and decision-making components designed to help post-divorce couple navigate parenting disputes.").

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special master.<sup>41</sup> Thus, it is prudent to consider whether a decision-making Parenting Coordinator could be appointed under the same authority that allows a court to appoint a special master.

Most states provide some procedure that allows courts to appoint special masters to handle certain aspects of litigation.<sup>42</sup> Twenty-three states have a rule of civil procedure that nearly mirrors the pre-2003 amended Federal Rule of Civil Procedure 53.<sup>43</sup> A special master statute or rule that is modeled after the pre-2003 Federal Rule of Civil Procedure 53 would limit the matters that can be referred to a master.<sup>44</sup> Under Rule 53, in a non-jury case, such as a divorce action in state court, reference to a special master may be made only upon a showing that “some exceptional condition” requires the reference.<sup>45</sup> Thus, a child custody or visitation matter is not appropriate to refer to a special master unless there is a showing of an “exceptional condition” requiring the reference. Limited available court time and overloaded dockets do not constitute “exceptional conditions” warranting referrals of family court matters to a special master.<sup>46</sup> Thus, such a rule

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<sup>41</sup> Terminology varies among the states; the same role might be called a “referee” or “commissioner.” See Lynn Jokela & David F. Herr, *Special Masters in State Court Litigation: An Available and Underused Case Management Tool*, 31 WM. MITCHELL L. REV. 1299, 1300, 1325 (2005) (chart summarizing each state's form of Rule 53).

<sup>42</sup> *Id.* at 1301-02. Illinois is the only state that does not have any mechanism governing appointment of special masters. *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> FED. R. CIV. P. 53.

<sup>46</sup> See, e.g., *Ex parte Mobayed*, 689 So. 2d 890, 892 -93 (Ala. Civ. App. 1997) (refusing to allow routine reference to a special master, noting that if congestion was an exceptional circumstance to warrant a reference, “present congestion would make references the rule rather than the exception,” which is contrary to the language of the rule itself that requires that reference be the exception not the rule) (citing *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957)).

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is not likely to provide the rationale for appointment of a Parenting Coordinator. At least four of the states that have been identified<sup>47</sup> as utilizing Parenting Coordination without specific authority have adopted the pre-2003 version of Fed. R. Civ. P. 53 as their basis for appointing a special master;<sup>48</sup> thus, a Parenting Coordinator's appointment in those jurisdictions (and any jurisdictions similarly situated) could probably not be based on the state's special master rule.<sup>49</sup>

Some states have rules or statutes providing for special masters that are substantively different from the pre-2003 federal rule discussed above.<sup>50</sup> Whether appointment of a Parenting Coordinator can be based on a court's authority to appoint a special master will depend on each state's special master authority. California is one state that has specifically determined whether the appointment of a Parenting Coordinator may be based on the state's authority to appoint a special master, or "referee" as it is called in California, and decided that it does not.<sup>51</sup>

In California, the appointment of a Parenting Coordinator is dependent on California's special master statute. However, California's special master statute allows

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<sup>47</sup> See *supra* note 29.

<sup>48</sup> Alabama: ALA. R. CIV. P. 53; Indiana: IND. R. TRIAL. P. 53; Nevada: NEV. R. CIV. P. 53; Tennessee: TENN. R. CIV. P. 53. See Jokela & Herr, *supra* note 41, at 1325 (listing those states as adopting the pre-2003 amended version of the federal rule).

<sup>49</sup> Interestingly, in 2003, Rule 53 of the Federal Rules of Civil Procedure, was amended to allow courts to appoint special masters to assist with pretrial and post-trial work; adoption of the current version of Rule 53 might therefore provide some basis for authority for appointing a Parenting Coordinator to oversee implementation of a court order. When courts appoint a special master to address pretrial or post-trial matters, it is usually because the court cannot efficiently address the matter. Jokela & Herr, *supra* note 41, at 1301 (citing FED. R. CIV. P. 53 advisory committee's note to 2003 amendments).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1322-23.

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reference to a special master in limited circumstances. Those limitations make Parenting Coordination impossible without consent of the parties.<sup>52</sup> For example, a Parenting Coordinator necessarily has to interpret existing court orders. The California Court of Appeals in *Ruisi v. Thieriot* viewed interpretation of existing orders as a question of law, which cannot be referred to a special master without consent.<sup>53</sup> Also, appointment of a Parenting Coordinator contemplates that he will address disputes that are, at the time of the appointment, unknown. California's special master statute, however, does not provide authority to refer unknown future disputes to a special master.<sup>54</sup> Thus, the court determined that, without consent, the role of Parenting Coordinator, which would interpret a court order and address future disputes, could not stand without consent of the parties.<sup>55</sup>

Where a special master rule might provide some authority for the appointment of a Parenting Coordinator, he should follow the procedures of that special master rule that forms the basis for the appointment.<sup>56</sup> However, in order to bestow all of the benefits of Parenting Coordination – specifically, the educational and counseling component – resort to a special master rule may not be workable.<sup>57</sup> The counseling and educational components

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<sup>52</sup> *Ruisi v. Thieriot*, 62 Cal. Rptr. 2d 766, 774 (Cal. Ct. App. 1997) (stating that the distinction between reference to a special master with consent and reference without consent is “carefully preserved in the statutes in order to comply with the constitutional mandate”).

<sup>53</sup> *Id.* (“The trial court has no authority to refer questions of law. . . . Disputes involving interpretation of the existing custody orders, for example, may present questions of law.”).

<sup>54</sup> *Id.* (“The trial court has no authority to compel a reference of unknown future disputes.”).

<sup>55</sup> *Id.*

<sup>56</sup> See generally *id.*

<sup>57</sup> See *In re Marriage of Rozzi*, 190 P.3d 815, 821 (Colo. Ct. App. 2008) (holding that the trial court could not combine appointment of Parenting Coordinator under Colorado's Parenting Coordinator statute,

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that are unique to Parenting Coordination necessarily involve *ex parte* communications. A rule or statute that authorizes appointment of a special master may not tolerate such *ex parte* communications.<sup>58</sup> Because of that fundamental difference between the role of a Parenting Coordinator and that of a special master, the special master rule or statute is not a well-founded basis for appointment of a Parenting Coordinator.

### C. Statutes or Rules Authorizing Arbitration as Possible Sources of Authority for Parenting Coordination

When a Parenting Coordinator does have decision-making authority, his role is somewhat like an arbitrator in that he is making a decision. However, statutes or rules of court that authorize a trial court to order arbitration cannot necessarily be construed to also approve of Parenting Coordination. In determining whether an arbitration statute can form the basis for Parenting Coordination, it is relevant to consider whether the state allows arbitration of child custody issues.

Some states that provide for court-ordered arbitration, generally, nevertheless prohibit arbitration of child custody and visitation issues.<sup>59</sup> Even parents' agreements to arbitrate custody have been held invalid. It

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which does not allow for decision-making authority, with decision-making authority of a special master provided for by Colorado's special master rule).

<sup>58</sup> *Horton v. Ferrell*, 981 S.W.2d 88, 91 (Ark. 1998) (holding that a special master is a judge subject to the Code of Judicial Conduct and therefore should disqualify after relying upon *ex parte* communications); *State ex rel. Hamrick v. Stucky*, 640 S.E.2d 243, 249 (W. Va. 2006) (holding that a special master is a pro-tempore part-time judge and must comply with the Code of Judicial Conduct).

<sup>59</sup> *See, e.g., Toiberman v. Tisera*, 998 So. 2d 4, 15 (Fla. App. 2008) (citing FLA. STAT. ANN. § 44.104(14)(West 2011); *Pulfer v. Pulfer*, 673 N.E.2d 656, 659 (Ohio Ct. App. 1996); *Glauber v. Glauber*, 600 N.Y.S.2d 740, 743 (N.Y. 1993).



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has been held that parents can never finally contract with respect to the custody of their children because the courts stand in the relation of *parens patriae* to minor children, and therefore, must determine questions of custody and visitation according to the welfare and best interests of the children.<sup>60</sup> Where a jurisdiction prohibits arbitration of child custody and visitation issues, the court should tread lightly in appointing a Parenting Coordinator and look to other sources of authority to support the appointment.

By agreement of the parties, some courts have allowed arbitration of child custody and visitation.<sup>61</sup> Where

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<sup>60</sup> See, *Glauber*, 600 N.Y.S.2d at 742-43 (“A court cannot be bound by an agreement as to custody and visitation, or either custody or visitation, and simultaneously act as *parens patriae* on behalf of the child.”); *Kelm v. Kelm*, 749 N.E.2d 299, 301 (Ohio 2001) (declining to allow arbitration of child custody issues, which go to the “very core of the child’s welfare and best interests,” because that would “encroach upon the trial court’s traditional role as *parens patriae*”). The court in *Kelm* was not convinced by the argument that the opportunity for judicial review of the arbitration award cured the defect; the court was of the opinion that the opportunity for de novo judicial review of an arbitration award destroys the parties’ expectation that an arbitration award will be final, therefore, the court said, it is, is wasteful of time and duplicative of effort. For that reason, it was not “advantageous to the best interests of children.” *Id.*

<sup>61</sup> See, e.g., *Fawzy v. Fawzy*, 973 A.2d 347, 360 (N.J. 2009) (“The right to parental autonomy subsumes the right to submit issues of child custody and parenting time to an arbitrator for disposition. . . . For us, the bundle of rights that the notion of parental autonomy sweeps in includes the right to decide how issues of custody and parenting time will be resolved. Indeed, we have no hesitation in concluding that, just as parents ‘choose’ to decide issues of custody and parenting time among themselves without court intervention, they may opt to sidestep the judicial process and submit their dispute to an arbitrator whom they have chosen.”) (quoting E. Gary Spitko, *Reclaiming the “Creatures of the State”: Contracting for Child Custody Decision Making in the Best Interests of the Family*, 57 WASH. & LEE L. REV. 1139, 1210 (Fall 2000)). For further discussion regarding the differing views as to whether to allow arbitration of child custody disputes, see George K. Walker, *Arbitrating Family Law Cases by Agreement*, 18 J. AM. ACAD. MATRIM. LAW. 429, 431-33 (2003).

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such precedent exists, a court might more reasonably rely on arbitration authority to order Parenting Coordination.<sup>62</sup> Nevertheless, there remains the substantive problem with the differences in the procedures. Ex parte communications between the parties and the Parenting Coordinator is troubling when the Parenting Coordinator does have decision-making authority, as he would under authority to arbitrate. In that situation, the parties are, in essence, communicating ex parte with the decision maker. When the judge is a decision maker and parties communicate with him ex parte, he must recuse himself.

If a Parenting Coordinator may serve where a judge could not, any court rule or statute to which a court resorts for appointment authority should clearly contemplate the appointment. Moreover, it must make additional provisions to compensate for the risks inherent in such an arrangement. Thus, authority for appointment of an arbitrator to decide an issue regarding child custody and visitation should not be resorted to as a basis for authority to appoint a Parenting Coordinator.

### D. Trial courts' Equitable or Inherent Powers as Possible Sources of Authority for Appointing a Parenting Coordinator

There are some arguments to be made that a trial court has authority to appoint a Parenting Coordinator without specific authority provided by a statute or court rule. In some jurisdictions, a trial court's authority to enter orders regarding custody and visitation of children is based on a court's general equity powers.<sup>63</sup> In such jurisdictions,

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<sup>62</sup> Kentucky, for example, allows arbitration of custody matters, *Masterson v Masterson*, 60 S.W. 301 (Ky. App. 1901), and also allows for Parenting Coordination, *see Telek v. Bucher*, No. 2008-CA-002149-ME, 2010 WL 1253473 (Ky. Ct. App. April 2, 2010).

<sup>63</sup> Alabama: *Snead v. Davis*, 90 So. 2d 825 (Ala. 1956) (stating that a court of equity awarding custody of children in divorce proceeding is

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the appointment of a Parenting Coordinator could be upheld as allowed under the court's broad inherent equity powers, acting as *parens patriae* in the best interest of the children.<sup>64</sup> Also, it might be upheld as allowed pursuant to the trial court's inherent authority to enforce its own orders and judgments.<sup>65</sup>

In some jurisdictions, however, trial court authority to make determinations about child custody and visitation

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exercising its inherent powers); Missouri: Urbanek v. Urbanek, 503 S.W.2d 434, 441 (Mo. App. 1973) ("The right and power to determine custody and maintenance of children is not born out of statute, but exists because of the inherent power of courts exercising equitable jurisdiction to care for and provide for a minor child."); I. v. B., 305 S.W.2d 713, 722 (Mo. Ct. App. 1957) (holding that, in determining the custody of a child of divorced parents, the jurisdiction of an equity court is not limited to the express provisions of a statute, but is broad enough to accomplish what is necessary to make a correct determination with respect to the child's custody and welfare); New Jersey: Henderson v. Henderson, 91 A.2d 747, 750 (N.J. 1952) (stating that the court has "general equity *parens patriae* jurisdiction" in child custody cases, predicated upon minor's residence in State); see Clemens v. Clemens, 90 A.2d 72, 76-77 (App. Div. 1952) (stating that a statute granting authority in divorce actions to make orders touching the care, custody, education, and maintenance of children was not intended to restrict the court's general jurisdiction over child custody).

<sup>64</sup>See, e.g., Clark v. Clark, 682 So. 2d 1051, 1054 -55 (Ala. Civ. App. 1996) (stating that, under the statute that provides that, in conjunction with a divorce, a court has "wide discretion" to "make such orders in respect to the custody of the children as their safety and well-being may require").

<sup>65</sup>See, e.g., *Telek*, No. 2008-CA-002149-ME, 2010 WL 1253473 (Ky. Ct. App. April 2, 2010) (indicating that the appointment of a Parenting Coordinator might be proper under the trial court's inherent authority to enforce its own orders) (citing Akers v. Stephenson, 469 S.W.2d 704, 706 (Ky. 1970)). But see Ruisi v. Thieriot, 62 Cal. Rptr. 2d 766, 772 n.10 (Cal. Ct. App. 1997) (rejecting the argument that the court had the authority to refer the matter to a Parenting Coordinator under the statute that allows the court to enforce its orders by any such orders as it determines necessary because the statute does not give the trial court explicitly authority to direct a reference of family law issues).

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is statutory.<sup>66</sup> Thus, the court has no power to do anything other than what is conferred upon the court by statute, perhaps even with consent of the parties.<sup>67</sup> Under that approach, a Parenting Coordinator probably cannot be permissibly appointed where no statute specifically allows it.<sup>68</sup> The logical extension of this view is that, even an agreement of the parties to allow a Parenting Coordinator to make decisions is not allowable, because such assignment of a judicial role to a non-judicial designee would be an abridgement of the trial court's statutory authority to make determinations on custody and visitation of a child in the child's best interest.<sup>69</sup>

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<sup>66</sup>Colorado: *In re Marriage of Trough*, 631 P.2d 1183, 1185 (Colo. App. 1981) (relying on a statute granting the court the authority to award custody to grandparents); Connecticut: *Fitzgerald v. Fitzgerald*, 362 A.2d 889, 891 (Conn. 1975) (relying on a statute granting the court the authority to award alimony and support through a *pendente lite* hearing); Maine: *Roberts v. Roberts*, 697 A.2d 62, 64 (Me. 1997) (stating that "the custody and support of minor children must be found in the statutes or it does not exist."); Michigan: *Merchant v. Merchant*, 343 N.W.2d 620, 623 (Mich. App. 1983) (reasoning that the court's authority during divorce proceedings is "purely statutory."); New Hampshire: *Stetson v. Stetson*, 171 A.2d 28, 29 (N.H. 1961) ("[T]he power of the Superior Court to award custody of minor children and to make provisions for the support of the wife and the children is wholly statutory, and . . . the court has no independent equity jurisdiction."); Virginia: *Cutshaw v. Cutshaw*, 261 S.E.2d 52, 54 (Va. 1979) ("The jurisdiction of a court to provide for child support pursuant to a divorce is purely statutory.").

<sup>67</sup> *See, e.g.*, *Miller v. Miller*, 97 N.E.2d 213, 216 (Ohio 1951) ("no jurisdiction other than that granted by statute can be conferred upon such a court even with the consent of the parties to an action").

<sup>68</sup> *Cf. Avila v. Leonardo*, 128 P.2d 43 (Cal. Dist. Ct. App. 1942) (stating that authority of the court in a divorce action to make necessary orders for the support of the minor children of the marriage is conferred by statute and its exercise cannot be limited or abridged by the parents).

<sup>69</sup> *See, e.g.*, *Heinonen v. Heinonen*, 14 P.3d 96 (Or. Ct. App. 2000) (holding that, because the trial court's authority is purely statutory and no statute authorizes the trial court to delegate that authority to a Parenting Coordinator, the trial court could not so delegate because

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Depending on a jurisdiction's view of the authority of the appointing court – that it can exercise equitable powers as necessary to ensure the best interest of the child on the one hand or as constrained by statute on the other – Parenting Coordination may be sustainable without a specific authorizing rule or statute.

### E. Other Statutes as Basis for Authority or Providing Analogous Support for the Authority to Appoint a Parenting Coordinator

A state might have some other statute or court rule allowing a third-party judicial designee that could provide the basis for the appointment of a Parenting Coordinator. For example, Kentucky does not have a statute specifically providing for the appointment of a Parenting Coordinator. However, a court identified as one possible source for the authority to appoint a Parenting Coordinator a statute that grants the trial court's authority to order a local child welfare department, for example, to exercise continuing supervision over the case to assure that the custodial or visitation terms of the decree are carried out.<sup>70</sup>

Similarly, New York has allowed appointment of a Parenting Coordinator under a court's authority to appoint a "case manager," although the Parenting Coordinator cannot

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delegating that authority would deprive the trial court of its statutorily mandated authority to determine issues of child custody and visitation time). *But see* Polacek v. Polacek, 222 P.3d 732 (Or. Ct. App. 2009) (allowing delegation of decision-making authority to a Parenting Coordinator post-*Heinonen* where the trial court would subsequently review that decision).

<sup>70</sup>*Telek v. Bucher*, No. 2008-CA-002149-ME, 2010 WL 1253473 (Ky. Ct. App. April 2, 2010). The statute allows such an appointment "[i]f both parents or all contestants agree to the order, or if the court finds that in the absence of the order the child's physical health would be endangered or his emotional development significantly impaired."

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make decisions.<sup>71</sup> New Jersey has allowed appointment of a Parenting Coordinator under the court's authority to appoint an expert to assist the court in making decisions, although such a Parenting Coordinator could not make decisions.<sup>72</sup>

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<sup>71</sup> In New York, which does not have a Parenting Coordination statute, it has been held that allowing a Parenting Coordinator to make decisions is an improper delegation of judicial authority, but that a Parenting Coordinator without decision-making authority may be appointed. *Edwards v. Rothschild*, 60 A.D.3d 675 (N.Y. 2009) (relying on cases that have held that it is improper to condition future visitation on the recommendation of a mental health professional or to allow a child's treating clinician to decide future custody issues); *see also* *L.S. v. L.F.*, 803 N.Y.S.2d 881 (N.Y. App. Div. 2005) (taking the "unusual step" of appointing a Parenting Coordinator and granting no decision-making authority to the Parenting Coordinator but appointing him to assist the parties in re-establishing visitation between the child and his father) (citing *Zafran v. Zafran*, 761 N.Y.S.2d 317 (N.Y. App. Div. 2003) (holding that it was not an improper delegation of judicial authority to appoint a "case manager," which has no decision-making authority)).

<sup>72</sup> *Lindsley v. Lindsley*, No. 2006 WL 157316 (N.J. Super. Ct. App. Div. Jan. 23, 2006). The husband argued that the use of a Parenting Coordinator was an impermissible delegation of judicial authority. *Id.* at \*6. The court decided, however, that the appointment of the Parenting Coordinator was the appointment of an expert provided for by New Jersey court rules. *Id.* The court recognized that a court was not to abdicate its decision-making role to an expert but held that it was clear that the trial court did not cede his authority to the expert; instead, he relied on the expert's report and had carefully defined the expert's role and preserved the court's role as the ultimate decision-maker in the case. *Id.* at \*7. The trial judge had said:

the [Parenting Coordinator] will offer you a recommendation, not a decision. And you can agree with it, resolve it, it's done. Or one of you can say, we didn't like that, we're going to the judge . . . . I'm not abdicating my decision-making authority to that person, but I'm giving him an opportunity to funnel through your dispute as parents without involving me, who wears this black dress.

*Id.* at \*1.

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Not all courts agree, of course, that a statute other than a Parenting Coordinator statute can allow for the appointment.<sup>73</sup> Moreover, where another statute is relied upon as the basis for the appointment, the Parenting Coordinator should adhere to the procedures and requirements of that statute, which may not be consistent with the goals and procedures of Parenting Coordination.<sup>74</sup>

A more sound approach might be that taken by the Superior Court of Pennsylvania, which determined that allowing a Parenting Coordinator to make decisions about issues that are “ancillary” to the trial court’s order was not an improper delegation of judicial authority.<sup>75</sup> Although

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<sup>73</sup> *Heinonen v. Heinonen*, 14 P.3d 96 (Or. Ct. App. 2000). The court in *Heinonen* recognized the statutory authority for the trial court to use services of a psychologist or a mental health expert to evaluate parenting time requests, OR. REV. STAT. ANN. § 107.425 (West 2010), and to modify parenting time provisions by stipulation subject to the court discretion to hold a hearing, OR. REV. STAT. ANN. § 107.174 (West 2010), and that the statutes provide for an expedited procedure to resolve disputes, OR. REV. STAT. ANN. § 107.425 (West 2010). 14 P.3d at 98-99. However, the court rejected any idea that what the trial court had done in *Heinonen* fell within the ambit of any of those statutes. *Id.*

<sup>74</sup> See *supra* Parts IV.A., B., and C.

<sup>75</sup> *Yates v. Yates*, 963 A.2d 535, 540 (Pa. Super. Ct. 2008). The Pennsylvania Superior Court also noted that at least one Pennsylvania County had adopted local rules authorizing appointing of a Parenting Coordinator and setting out the role of a Parenting Coordinator. It also noted that the Pennsylvania Supreme Court Domestic Relationships Procedural Rules Committee was considering a proposed Rule of Civil Procedure and a model order to unify parenting coordination procedures across the statute of Pennsylvania. *Id.* at 539 n.2. *Yates* has been cited by the Maryland Court of Special Appeals as instructive in that court’s decision that a trial court’s delegation of authority to a third party to oversee family therapy was not improper. *Meyr v. Meyr*, 7 A.3d 125, 139-140 (Md. Ct. Spec. App. 2010). Because the trial court had resolved the primary issues regarding custody and visitation and the third-party’s role involved “merely the coordination of family therapy,” which the court viewed as “ancillary” to custody and visitation, it determined that the trial court had not improperly delegated its judicial authority. *Id.*

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authority for the appointment of a special master and a hearing officer did not provide the authority for the appointment of a Parenting Coordinator, those provisions were at least *precedent for the “limited” delegation* of judicial authority.<sup>76</sup>

As the Pennsylvania court recognized, the delegation of authority to a Parenting Coordinator is a “limited” delegation, and there is undoubtedly precedent in any jurisdiction for some limited delegation of some tasks related to a judge’s disposition of his duties. That rationale – that the role of a Parenting Coordinator is limited and there is analogous authority for a limitation delegation of judicial authority – combined with the idea that the court does have some *parens patriae* authority to protect the best interest of the children and to enforce its own orders, provides a valid argument that Parenting Coordination is sustainable without a specific statute or court rule authorizing the appointment.<sup>77</sup> Where a trial court has some inherent authority to ensure the best interest of the children, with or without specific statute or rule-based authority, Parenting Coordination can be sustained. Combined with the substantial benefits of a qualified Parenting Coordinator, imposing appropriate limitations on the Parenting Coordinator’s role can incrementally diminish the argument that appointment is an improper delegation of

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<sup>76</sup> *Yates*, 963 A.2d at 541.

<sup>77</sup> It might be argued that the role is narrow enough that the Parenting Coordinator’s role is merely ministerial and not judicial. In deciding whether an improper judicial delegation has occurred in different contexts, courts have focused on whether the action delegated involved a “judicial function” or the “ultimate decision-making authority,” or involved merely ministerial matters or “details.” *See, e.g., United States v. Peterson*, 248 F.3d 79, 85 (2d Cir. 2001) (holding that the delegation of the details of court-ordered therapy, including choosing a provider and schedule, was permissible); *United States v. Grant*, 52 F.3d 448, 451 (2d Cir. 1995) (holding that the trial judge did not delegate a judicial function by directing the jury to tell the reporter to go faster or slower as the jury listened to testimony read-backs).



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judicial authority. Achieving an appropriate balance of benefits and limitations is discussed in light of the basis for appointment authority, which achieves a sustainable appointment. The benefits and limitations are discussed in the remainder of this Article.

### V. The Benefits of Parenting Coordination in High-Conflict Cases

Unlike a judgment in almost every other kind of litigation, a divorce judgment is written at a specific point in time and attempts to address the relationship of the parties at that specific point in time and in the future. However, that relationship is not static; it changes.<sup>78</sup> Ideally, a parenting plan would specify in detail the terms governing the post-divorce relationship, such as the visitation schedule, so as to avoid opportunities for frequent conflict. However, often times a parenting plan is not sufficiently specific, thus allowing for frequent opportunities for conflict.<sup>79</sup> Furthermore, for divorced couples who have not developed the ability to resolve

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<sup>78</sup> Kelm v. Kelm, 749 N.E.2d 299, 304 (Ohio 2001) (“[A]s a practical matter, a custody and visitation order is never absolutely final.”).

<sup>79</sup> Linda D. Elrod, *A Minnesota Comparative Family Law Symposium: Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL. L. REV. 495, 529-30 (2001) (“Highly structured parenting plans that help parents disengage may be valuable tools to deal with high-conflict parents. A lengthy and detailed parenting plan gives less room for each parent to manipulate or feel the other parent is manipulating them.”). It has been suggested that a Parenting Coordinator assist in the process of drafting such a detailed parenting plan. See, e.g., Cassandra Brown, *Ameliorating the Effects of Divorce on Children*, 22 J. AM. ACAD. MATRIM. LAW 461, 478 (2009) (suggesting that a Parenting Coordinator could add “increased structure and detail in the parenting plan”) (citing Coates et al., *supra* note 3, at 249-250). Such a role, however, is not consistent with the typical Parenting Coordinator’s role which arises after a court order is entered. See *infra* Part VII.

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conflict between them, even a parenting plan with intricate details cannot eliminate all possibility of conflict. Even the most detailed parenting plan cannot contemplate every situation that will arise: children's ages, interests and activities change over time, and parents may remarry and relocate. A parenting plan that appeared to contemplate and address every opportunity for conflict when the children were three and five years old will not necessarily contemplate and resolve every conflict that will arise when those same children are thirteen and fifteen years old.

Parenting Coordination is intended for high-conflict divorced parents – those who otherwise would repeatedly be in court seeking intervention in their daily lives. If the divorced parents do not have the ability to resolve the conflicts that arise during that period, they will frequently be back in court. These high-conflict parents use a disproportionate amount of the court's time and resources.<sup>80</sup>

While Parenting Coordinators address what may be perceived as minor conflicts between the parents,<sup>81</sup> depending on whether and how these conflicts are resolved,

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<sup>80</sup> Coates et al., *supra* note 3, at 246-47; *see also* Wilma J. Henry et al., *Parenting Coordination and Court Relitigation: A Case Study*, 47 FAM. CT. REV. 682, 682-83 (October 2009) (stating that family courts and associated professionals spend approximately 90 percent of their time on about 10 percent of parents).

<sup>81</sup> Coates et al., *supra* note 3, at 247 (noting that disputes between high-conflict parents are often minor, involving such things as one-time changes in a visitation schedule, telephone access, and vacation planning). *See also infra* Part VII, discussing that, properly utilized, Parenting Coordinator will encompass only assisting the parties in implementing a well-drafted, detailed parenting plan that has been incorporated into a court order and will, thus, address only minor issues. Parenting Coordinators should be involved when the rights at stake are relatively insignificant in comparison to a right such as the right to custody or visitation in toto. If Parenting Coordinators are being used in a different capacity the balance maybe tipped against granting decision-making authority to the Parenting Coordinator. However, such is not the proper role of a Parenting Coordinator.

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the conflicts can have a major impact on the children of those parents. The level and intensity of the parental conflict prior, during, and after divorce proceedings, rather than the divorce itself, is thought to be the most dominant factor in a child's psychological and social adjustment post-divorce.<sup>82</sup> Exposure to conflict can result in problems such as perpetual emotional turmoil, depression, substance abuse, and educational failure.<sup>83</sup> Thus, it is imperative to avoid even those conflicts regarding minor issues, and implement mechanisms of resolving those conflicts amenable. However, the typical mechanism for resolving conflict – the adversarial process of our court system – encourages combat and discourages cooperation.<sup>84</sup>

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<sup>82</sup> See, e.g., Elrod, *supra* note 79, at 497; see generally John H. Grych, *Interparental Conflict as a Risk Factor for Child Maladjustment: Implications for the Development of Prevention Programs*, 43 FAM. CT. REV. 97, 99 (2005).

<sup>83</sup> Elrod, *supra* note 79; see generally Grych, *supra* note 82.

<sup>84</sup> See, e.g., Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL'Y & L. 129, 131 (2002) ("It has long been noted that the adversarial divorce process exacerbates the conditions that create risk for children, and often undermines parental efforts to maintain protective conditions for children after separation.") (citing JANET R. JOHNSTON & LINDA G. CAMPBELL, *IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT* 38-44 (1988)). Kelly explains the failings of the adversarial process:

The central failings of the adversarial process with respect to custody disputes are the inherent mechanisms and practices that escalate conflict, diminish the possibility of civility between parents, exacerbate the win-lose atmosphere that encourages bitterness and parental irresponsibility, and weaken important parent-child relationships. The basic nature of the adversarial process pits parents against each other, encourages polarized and positional thinking about each other's deficiencies, and discourages parental communication, cooperation, and more

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In response to the detrimental effects of the adversarial process and parental conflict, multiple means of alternative dispute resolution have developed, such as mediation and arbitration of child custody cases. Parenting Coordination, however, is different from other alternative means of dispute resolution; it looks to the future beyond the instant conflict.<sup>85</sup> In addition to addressing the instant conflict between the parents, Parenting Coordination further seeks to avoid future conflict. Parenting Coordination sets out to *teach* the parents to make decisions and resolve conflicts among themselves.<sup>86</sup> This “teaching”<sup>87</sup> component of Parenting Coordination separates Parenting Coordination from other alternative dispute resolution processes. It provides benefits that other alternative dispute resolution processes do not to the court

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mature thinking about children's needs at a critical time of change and upheaval. Possible future constructive relationships between parents are often thus destroyed.

Kelly, *Psychological and Legal Interventions*, 10 VA. J. SOC. POL'Y & L. at 131.

<sup>85</sup> Other differences between Parenting Coordination and familiar alternative dispute resolution processes are discussed further in Parts IV.A, B., and C above.

<sup>86</sup> Kirkland, *Positive Coping*, *supra* note 15, at 62 (“Parenting coordinators attempt to teach divorced parents how to function independently of the court to resolve conflicts and implement their own parenting plans.”); Shear, *supra* note 16, at 90 (explaining that Parenting Coordination incorporates elements of “parent education and coaching, mediation, arbitration, judicial reference and child custody evaluation”); Greenberg, *supra* note 15, at 208 (cleverly using in this context the Chinese proverb: “Give a man a fish and he will eat for a day. But, teach him to fish, he will eat for a lifetime.”).

<sup>87</sup> In interviews with Parenting Coordinators in North Carolina, most Parenting Coordinators agreed that their primary issue is making clear to the parents the effect that their ongoing conflict would have on the children. Sherrill W. Hayes, “*More of a Street Cop than a Detective*”: *an Analysis of the Roles and Functions of Parenting Coordinators in North Carolina*, 48 FAM. CT. REV. 698, 702 (October 2010).

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system, the children of divorce, and the high-conflict parents.

Parenting Coordination also provides a benefit to the court system. With the proper utilization of Parenting Coordination, the court system does not become what it otherwise would – a type of social service agency.<sup>88</sup> In the short term, the Parenting Coordinator will assist the parties in mutually resolving a given conflict, or making a decision that will resolve the instant conflict. Thus, the parties will not appear before the court for the given conflict.

Secondly, there are longer-term benefits to Parenting Coordination. Ideally, throughout the course of working with the Parenting Coordinator, the parents will develop the skills and abilities to resolve conflicts on their own. This in turn reduces the need to resort to the judiciary – or even a Parenting Coordinator – when future conflicts arise. A study on the effectiveness of Parenting Coordination determined that, after the appointment of Parenting Coordinators in high-conflict cases, there was a “near 25-fold” decrease in court appearances in those cases.<sup>89</sup> A more recent study indicated a reduction of

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<sup>88</sup> See Dana E. Prescott, *When Co-Parenting Falters: Parenting Coordinators, Parents-in-Conflict, and the Delegation of Judicial Authority*, 20 ME. B.J. 240, 243 (2005) (stating that because “courts will continue to be the vessel into which all this chaos is poured,” “courts will evolve as more of a social service agency th[a]n a separate constitutional branch of government charged with the issuance of judgments within the traditional boundaries of the law”).

<sup>89</sup> Psychologist and Parenting Coordinator, Terry Johnston, Ph.D., analyzed 166 cases over a two-year period. AFCC, *Implementation Issues*, *supra* note 3, at 534 (citing Johnston, T., *Cost Effectiveness of Special Master Use*, unpublished report, 1994). In the year before appointment of a Parenting Coordinator, those 166 cases had 993 court appearances among them, an average of six court appearances per case. *Id.* In contrast, in the year after appointment, those cases had only thirty-seven court appearances among them, an average of .22 court appearances per case. *Id.*; see also Elizabeth Kruse, *ADR, Technology, and New Court Rules – Family Law Trends for the Twenty-First Century*, 21 J. AM. ACAD. MATRIMONIAL LAW, 207, 217 (2008) (citing

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approximately seventy-five percent of child-related court filings after Parenting Coordination was implemented.<sup>90</sup>

Parenting Coordination also benefits the children of divorced parents. The use of a Parenting Coordinator can allow for a more harmonious – or at least a less hostile – environment for the children. If parents proceed to deal with conflicts on their own by hiring their own attorneys and resolving disputes in the adversarial system, it becomes unlikely that they will develop the skills and abilities to resolve the conflict on their own. In the meantime, that litigious environment in the respective households is not in the best interest of the children; it is in the best interest of the children for their parents to be able to amicably resolve conflicts as they arise.<sup>91</sup>

Parenting Coordination also benefits high-conflict parents. As a purely practical matter, when small post-divorce conflicts arise between parents, the parents need a speedy resolution. They often cannot get in front of the court soon enough to meaningfully resolve the conflict. A Parenting Coordinator is much more easily accessible than a judge. A Parenting Coordinator can help the parties to make decisions expeditiously or quickly make a decision when the parties are unable to do so.<sup>92</sup> For example, assume

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Johnston's study as evidence that Parenting Coordination is an effective tool for reducing repeat litigation among parents).

<sup>90</sup> Henry et al., *supra* note 80, at 682.

<sup>91</sup> See discussion *infra* Part V regarding the detrimental effects on children of post-divorce conflict. At least some courts take the same view. See, e.g., *Cichocki v. Mazurek-Smith*, 8 Pa. D. & C. 5th 361, 377 (2009) (“Hopefully, the [Parenting Coordinator] will be able to facilitate the interaction of the parties. Beyond that, this court believes that co-parenting counseling is imperative. The parties need to begin to understand the other's point of view, which will hopefully soften their stance against each other and benefit the minor child.”) (footnote omitted).

<sup>92</sup> Shear, *supra* note 16, at 91 (parents using Parenting Coordination “trade off one set of risks and benefits for another – giving up formal rights and guarantees of fair play and accountability for informality,

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that a parenting plan prescribes that the father shall have visitation with the children on alternating weekends. The same parenting plan also provides that the mother shall have the children on Mother's Day weekend. The parenting plan, however, does not address what will happen when there is a conflict between alternating weekend visitation and Mother's Day weekend visitations. Four weeks from Mother's Day weekend, the parents realize there is a conflict and are unable to resolve it. The likelihood of presenting the issue to the court before Mother's Day is slim. However, the Parenting Coordinator is available much sooner.<sup>93</sup> Ideally, he can help the parties reach a mutual decision. If not, he may<sup>94</sup> be able to make a decision. Either way, the matter is resolved in a timely manner. The parents also benefit from the process in that the Parenting Coordinator can equip them with the ability to resolve future conflicts on their own.

Ideally, the Parenting Coordination process will also be less expensive for the parents than resolving their disputes in the adversarial system by hiring an attorney. If parents seek to resolve their dispute in the adversarial environment of the court, they would each be paying their own attorneys. Furthermore, by using the adversarial system rather than a Parenting Coordinator, they would be more likely to return to court again and again, paying their lawyers again and again.<sup>95</sup> Of course, where the Parenting

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quick decisions, and a decision-maker who has substantial experience in child custody issues, and incremental decision-making").

<sup>93</sup> See Hayes, *supra* note 87, at 699 (one of the three major roles identified in interviews with Parenting Coordinators in North Carolina was resolving issues in a timely manner).

<sup>94</sup> Whether the Parenting Coordinator has decision-making authority depends upon the terms of the appointment and any governing Parenting Coordination statute or court rule in the jurisdiction.

<sup>95</sup> See *supra* note 89 (discussing study that showed that parents using Parenting Coordination returned to court an average of only .22 times a year, as compared to six times a year without use of Parenting Coordination).

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Coordinator does not have decision-making authority but is simply a “hoop” through which the parties must jump before getting before the court,<sup>96</sup> with their lawyers in tow, this does not hold true.

Thus, some of the practical benefits of Parenting Coordination are eroded if the Parenting Coordinator does not have decision-making authority. Consider the above hypothetical. If the Parenting Coordinator does not have decision-making authority and the parties are unable to reach a mutual decision about who has the children on Mother’s Day weekend, the parties will have to resort to court. Thus, (1) the court is left to resolve the conflict; (2) more time has passed, making it even less likely that the parties will get before the court in time for the court to meaningfully resolve the conflict; (3) the children have possibly been exposed to conflict; (4) the parties’ acrimony has increased; and (5) their expenses have been duplicated.

There are, nevertheless, some benefits of Parenting Coordination even when the Parenting Coordinator does not have decision-making authority. Merely recommending solutions when the parties encounter conflict will help the parties resolve the immediate problem. Furthermore, it will help the parties to develop guidelines and strategies that will help them to avoid similar problems in the future<sup>97</sup> and further to develop strategies to avoid future conflict.<sup>98</sup> However, the substantive benefits that justify Parenting

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<sup>96</sup> This is the result if the Parenting Coordinator does not have decision-making authority; thus, this Article recommends Parenting Coordination with decision-making authority.

<sup>97</sup> *In re Marriage of Rozzi*, 190 P.3d 815, 821 (Colo. Ct. App. 2008) (discussing the provision of Colorado’s code that allows for appointment but does not provide the Parenting Coordinator with decision-making authority and noting that having a Parenting Coordinator merely assisting the parties in resolving current and future conflict was the legislative intent in passing the Parenting Coordination statute).

<sup>98</sup> *Id.*



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Coordination are even greater when the Parenting Coordinator has decision-making authority.<sup>99</sup>

### VI. Parenting Coordination Qualifications: Vital to Benefit Realization

As discussed in Part V above, one of the primary benefits of Parenting Coordination is that it provides high-conflict parents with the skills to avoid or resolve future conflicts on their own. Thus, for Parenting Coordination to bestow its full benefits on its intended beneficiaries, the Parenting Coordinator must be qualified to equip the parents with those skills. Without a qualified Parenting Coordinator, the benefits of Parenting Coordination erode. Parenting Coordination is a “legal-psychological hybrid.”<sup>100</sup> Thus, a Parenting Coordinator must have adequate training in both areas.

The AFCC Task Force on Parenting Coordination requires that a Parenting Coordinator have “training and experience in family mediation” and that the Parenting Coordinator be certified as a mediator in his jurisdiction if certification is available.<sup>101</sup> In addition, the Parenting Coordinator shall be either (1) a licensed mental health professional, (2) a legal professional in an area relating to families, or (3) a certified family mediator under the rules or laws of the jurisdiction with a master's degree in a mental health field.<sup>102</sup> Furthermore, the Parenting

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<sup>99</sup> Shear, *supra* note 16, at 90 n.4 (stating that, although the AFCC Guidelines treat decision-making authority as an optional component of Parenting Coordination, California’s family court community, who has experimented with Parenting Coordination for more than a decade, has seen Parenting Coordination decision-making authority as “essential to deterring re-litigation”).

<sup>100</sup> Kirkland & Sullivan, *supra* note 2, at 633; Sullivan, *supra* note 2, at 576.

<sup>101</sup> AFCC, *Guidelines supra* note 9, at 166.

<sup>102</sup> *Id.*

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Coordinator should have “extensive practical experience in the profession with high conflict or litigating parents” and “training in the parenting coordination process, family dynamics in separation and divorce, parenting coordination techniques, domestic violence and child maltreatment, and court specific parenting coordination procedures.”<sup>103</sup>

Parenting Coordination has been described as “practicing at the interface of the legal/psychological fields.”<sup>104</sup> Without requirements that a Parenting Coordinator have the education, training, and skills to practice at this interface, the benefits of Parenting Coordination erode. Where the benefits that can be bestowed by a properly qualified Parenting Coordinator are eroded, so does the justification for allowing such a third party to intrude into the family in conjunction with their family court litigation. Yet the qualifications required by various jurisdictions vary.<sup>105</sup>

The delegation of judicial authority is a “serious issue” and the courts should therefore delegate its authority – to the degree permissible – only to qualified professionals.<sup>106</sup> Any rationale for Parenting Coordination offered in this Article deteriorates if the Parenting Coordinator appointed is not adequately qualified: the

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<sup>103</sup> The AFCC Guidelines also provide that the Parenting Coordinator shall “acquire and maintain professional competence in the parenting coordination process” by regularly participating in educational activities promoting professional growth. *Id.* Rather idealistically, the Guidelines provide that a Parenting Coordinator “shall decline an appointment, withdraw, or request appropriate assistance when the facts and circumstances of the case are beyond the Parenting Coordinator’s skill or expertise.” *Id.*

<sup>104</sup> Sullivan, *supra* note 2, at 581.

<sup>105</sup> AFCC, *Implementation Issues*, *supra* note 3, at 552 (“some require[] possession of a social science or mental health degree; others provide[] that paraprofessionals, such as a court staff, could fulfill the function provided adequate training was had;” “[i]n many jurisdictions, attorneys serve as PCs”).

<sup>106</sup> AFCC, *Guidelines*, *supra* note 9, at 165.

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teaching (or counseling) component of Parenting Coordination is what tips the balance in favor of Parenting Coordination, because that teaching (or counseling) component is what broadcasts the benefits of Parenting Coordination into the future. That component is also what the judges, mediators, arbitrators, and special masters cannot provide. The Parenting Coordinator's ability to provide benefits are a significant part of the equation: benefits of Parenting Coordination combined with limitations on Parenting Coordination overcome the arguments against Parenting Coordination considered in this Article.

### VII. Limitation on Parenting Coordination: Stage of Divorce Litigation

May a Parenting Coordinator be appointed (1) immediately upon the commencement of a divorce proceeding, (2) after a court has entered a pendente lite order establishing visitation during the pendency of the divorce proceeding, or (3) only after a court has entered a judgment of divorce that includes a final custody determination and a parenting plan? When a parent, post-divorce, petitions the court for modification of the previously-entered parenting plan, may a court immediately appoint a Parenting Coordinator, appoint a Parenting Coordinator after entering a pendent lite order on the modification petition, or appoint a Parenting Coordinator only after the court has entered a judgment on the modification petition? Limiting the appointment to only after the trial court has entered an order, and thus limiting the Parenting Coordinator's role to implementing the pre-existing court order, weakens arguments that Parenting Coordination is an improper delegation of judicial authority.

The AFCC Task Force's Guidelines indicate that Parenting Coordination is proper only when there is already

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a parenting plan or court-ordered custody and visitation arrangement in place.<sup>107</sup> Parenting Coordination should be limited to addressing compliance with an already-existing court order. Where conflicts arise, the Parenting Coordinator should first assist the parties in reaching an agreement and, if they cannot, make a decision that is consistent with the already-existing court order.<sup>108</sup> Thus, the Parenting Coordinator is not truly free to take independent action that might be strictly within the province of the judiciary; instead, he is bound by the terms of the order that the court has already entered and assists the parties in their attempt to comply with the court order.<sup>109</sup> For those reasons, appropriately timing the Parenting Coordinator's appointment strips a layer from the argument that Parenting Coordination is an improper delegation of judicial authority.

Many states do not allow Parenting Coordination until a court has already entered an order to guide the Parenting Coordinator in his mission. In Oklahoma, which has operated under enabling legislation longer than any other state, the Parenting Coordination Act contemplates

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<sup>107</sup> The Task Force defines Parenting Coordination as assisting "high-conflict parents to implement their parenting plan. . . ." AFCC, *Guidelines*, *supra* note 9, at 165. It describes the objective of Parenting Coordination as to "assist high-conflict parents to implement their parenting plan, to monitor compliance with the details of the plan, to resolve conflicts regarding their children and the parenting plan in a timely manner, and to protect and sustain safe, health and meaningful parent-child relationships." *Id.*

<sup>108</sup> *Id.* at 171 (Guideline XI, stating that "A PC should attempt to facilitate agreement between the parties in a timely manner on all disputes regarding their children as they arise. When parents are unable to reach agreement, and if it has been ordered by the court, or authorized by consent, the PC shall decide the disputed issues.").

<sup>109</sup> *Telek v. Bucher*, No. 2008-CA-002149-ME, 2010 WL 1253473 \*5 (Ky. Ct. App. April 2, 2010) (holding that Parenting Coordination was not an improper delegation of judicial authority because, among other reasons, the trial court was "simply supervising the court's orders" to ensure that the terms of its orders are carried out.).

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that a Parenting Coordinator will be appointed only after a court order is in place – either pendente lite or final – and that the Parenting Coordinator will assist in implementation of that already-existing order or judgment.<sup>110</sup> Specifically, the Act limits a Parenting Coordinator’s authority to “matters that aid the parties in,” among other things, “complying with the court’s order of custody, visitation, or guardianship.”<sup>111</sup> Given that the Parenting Coordinator’s decision-making authority is limited to those things that will aid the parties in complying with orders that are already entered, the statute does not indicate that a Parenting Coordinator has a role when no orders have been entered.<sup>112</sup>

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<sup>110</sup> See OKLA. STAT. ANN. tit. 43, § 120.3 (West 2010).

<sup>111</sup> *Id.*

<sup>112</sup> A pioneer of the Parenting Coordinator movement in Oklahoma seems to interpret the statute differently but nevertheless concludes that best practice would be to have a parenting plan in place before a Parenting Coordinator is appointed. See Barbara Ann Bartlett, *Parenting Coordination: A New Tool for Assisting High-Conflict Families*, 15 OKLA. B. J. 453, 454 (2004) (available at [http://www.okbar.org/obj/articles\\_04/021404.htm](http://www.okbar.org/obj/articles_04/021404.htm)). This author, however, contends that it is not only “best practice,” but necessary under the statutory scheme. Consistent with that interpretation of the statute, the Oklahoma Court of Civil Appeals has stated that the “plain language of the Act clearly limits the power and authority of a PC to ‘aid’ in the ‘enforcement of the court’s order of custody.’” *Fultz v. Smith*, 97 P.3d 651, 654 (Okla. Civ. App. 2004). Although the court did not specifically state that the appointment of a Parenting Coordinator *cannot* be made before the trial court has entered an order, it reveals that such an appointment is not workable. If the Parenting Coordinator’s authority is limited to “aid” in enforcement of the court’s order, what decisions is the Parenting Coordinator to make in a situation where no order exists? Even in a modification proceeding where some order has been entered – the judgment of the initial divorce proceeding, such as in *Fultz*, the trial court’s appointment of a Parenting Coordinator is pointless if his role is limited to “aiding” in the enforcement of a court order because the focus of that litigation is modify that very order.

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The Colorado Parenting Coordinator statute more specifically indicates that a Parenting Coordinator's appointment is proper only after the trial court has entered an order.<sup>113</sup> It provides that a court may appoint a Parenting Coordinator "at any time after the entry of an order concerning parental responsibilities and upon notice to the parties."<sup>114</sup> Idaho,<sup>115</sup> Louisiana,<sup>116</sup> and Vermont<sup>117</sup> likewise allow the appointment of a Parenting Coordinator only after the court has entered an order establishing custody.

Some states do allow appointment of a Parenting Coordinator prior to the court entering an order. For example, Florida allows appoints a Parenting Coordinator

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<sup>113</sup> COLO. REV. STAT. ANN. § 14-10-128.1 (West 2010) (stating that "*at any time after the entry of an order* concerning parental responsibilities and upon notice to the parties, the court may . . . appoint a parenting coordinator. . . .") (emphasis added); COLO. REV. STAT. ANN. § 14-10-128.3 (West 2010) (stating that, in addition to the appointment of a parenting coordinator, a court may "*at any time after the entry of an order* concerning parental responsibilities . . . the court may appoint a qualified domestic relations decision-maker. . . .") (emphasis added). See also AFCC, *Implementation Issues*, *supra* note 3, at 540 ("PCs are generally used in Colorado in post-decree high conflict parenting situations where communication has been difficult and litigation ongoing.").

<sup>114</sup> COLO. REV. STAT. ANN. § 14-10-128.1 (West 2010).

<sup>115</sup> IDAHO R. CIV. P. 16(I)(3) ("The appointment may be made at any stage in the proceeding *after entry of an order, decree, or judgment* establishing child custody.") (emphasis added).

<sup>116</sup> LA. REV. STAT. ANN. § 9:358:1(A) (2010) ("[T]he court may appoint a parenting coordinator in a child custody case for good cause shown *if the court has previously entered a judgment establishing child custody*, other than an ex parte order.") (emphasis added). The purpose of the limitation is to "prevent the court from using the parenting coordinator process as a means of abdicating its responsibility o make the initial custody determination." *Griffith v. Latiolais*, 32 So. 3d 380, 398 (La. Ct. App. 2010) (citing comments to the statute).

<sup>117</sup> V.R.F.P. 4(s) (allowing a court to appoint a Parenting Coordinator "[i]n an action under this rule in which parental rights and responsibilities *have been adjudicated*") (emphasis added).

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“where an order is sought or entered.”<sup>118</sup> Florida allows the Parenting Coordinator to assist the parties in creating and implementing the parenting plan.<sup>119</sup> Oregon also appears to allow appointment prior to entry of a court order by allowing a Parenting Coordinator to assist the parties in creating and implementing a parenting plan.<sup>120</sup> Arizona’s rule is the same.<sup>121</sup> North Carolina only permits the appointment before an order has been entered with consent of the parties;<sup>122</sup> without the parties consent, a Parenting Coordinator can be appointed only after a custody order or parenting plan has been entered.<sup>123</sup> In California, which has operated without any enabling legislation for over sixteen years,<sup>124</sup> although the appointment of a Parenting Coordinator typically occurs after a parenting plan has been put in place, it has been reported that Parenting Coordinators are sometimes appointed to manage the case during its pendency, due to the lengthy period of time required to reach a court decision in high-conflict cases.<sup>125</sup>

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<sup>118</sup> FLA. STAT. ANN. § 61-125 (West 2010).

<sup>119</sup> *Id.*; see also *supra* note 86 referring to Parenting Coordinators assisting in drafting of parenting plans.

<sup>120</sup> OR. REV. STAT. ANN. § 107.425(3)(a) (West 2010).

<sup>121</sup> ARIZ. R. FAM. L. PROC. 74(G) (allowing appointment “[p]rior to, simultaneously with, or after entry of a decree, judgment or custody or parenting time order”).

<sup>122</sup> N.C. GEN. STAT. ANN. § 50-91 (West 2010) (“The court may appoint a parenting coordinator *at any time during the proceedings* of a child custody action involving minor children . . . *if all parties consent to the appointment.*”) (emphasis added).

<sup>123</sup> N.C. GEN. STAT. ANN. § 50-91 (West 2010) (“The court may appoint a parenting coordinator *without the consent* of the parties *upon entry of a custody order other than an ex parte order, or upon entry of a parenting plan* only if the court also makes specific findings. . . .”) (emphasis added). See *infra* Part VIII for a discussion of the findings a court must make to appoint a Parenting Coordinator without consent.

<sup>124</sup> Shear, *supra* note 16, at 90.

<sup>125</sup> AFCC, *Implementation Issues*, *supra* note 3, at 540. A child custody evaluator is sometimes appointed along with the Parenting Coordinator. See also *Lindsley v. Lindsley*, 2006 WL 157316 (N.J. Super. Ct. App.

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Although some jurisdictions allow for appointment prior to the entry of a court order, in its typical form, Parenting Coordination comes after the trial court has entered an order and a Parenting Coordinator assists the parties in complying with and implementing the parenting plan.<sup>126</sup> Significantly, confining the appointment to that point in time – only after the trial court has entered an order – and limiting the Parenting Coordinator’s role to implementing the pre-existing court order, while counseling and educating along the way, allows Parenting Coordination to address the problems that it was created to remedy and protects against arguments that Parenting Coordination is an delegation of judicial authority.<sup>127</sup> Thus, the appointment is more likely to be sustained if the appointment is made after the entry of a trial court’s order.

### VIII. Limitations on Parenting Coordination: Conditions Precedent to Appointment

The conditions precedent to appointment are relevant in considering whether the appointment of a Parenting Coordinator is an improper delegation of judicial authority. Relevant conditions precedent to be discussed

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Div. Jan. 23, 2006), referring to the appointment of a Parenting Coordinator whose role came into play before the parties were divorced and who worked with the parties to facilitate settlement of their divorce and made a report to the court on which the court relied to make its custody determination.

<sup>126</sup> See AFCC’s definition of Parenting Coordinator, *supra* note 8; see also Hayes, *supra* note 87, at 699 (two of the three major roles identified in interviews with Parenting Coordinators in North Carolina were implementation of the existing plan and compliance with the existing plan).

<sup>127</sup> While having someone assist the parties *during the litigation* work through their disagreements and assist the parties in drafting a mutually acceptable and detailed parenting plan certainly has value, that is not Parenting Coordination in its classic form, see *id.*, and, thus, is not the “Parenting Coordination” that this Article addresses.



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here are consent to the appointment and trial court findings.<sup>128</sup> Where the parties consent to the appointment, their later grounds for objection to the appointment is not well-founded.<sup>129</sup> Even where parties do not consent to the appointment, if the trial court has made specific findings to justify the appointment – such as a finding that the parents are in high conflict or that the appointment of the Parenting Coordinator is in the best interest of the children – the additional “intrusion” into the family by appointment of the Parenting Coordinator may be justified.

The Guidelines of the AFCC Task Force on Parenting Coordination require that a Parenting Coordinator serve only by court order or with consent of the parties.<sup>130</sup> The Guidelines indicate that appointment is proper when the parents are “high conflict.”<sup>131</sup> Although the Guidelines do not specifically define “high conflict,” they describe the Parenting Coordinator’s role as “most frequently reserved for those high-conflict parents who have demonstrated their longer-term inability or

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<sup>128</sup> Some states make ability to pay a statutory condition precedent to the appointment of a Parenting Coordinator. *See, e.g.*, OKLA. STAT. ANN. tit. 43, § 120.5 (West 2010); N.C. GEN. STAT. ANN. § 50-91(b) (West 2010). The requirement that only children of parents with the ability to pay are to benefit from Parenting Coordination weakens the argument that part of the justification for a Parenting Coordinator’s “intrusion” into the family is the state’s obligation to ensure the best interest of the children, *see supra* Part IV.D. Some states also consider evidence of domestic violence in determining whether Parenting Coordination is appropriate. *Compare* COLO. REV. STAT. ANN. § 14-10-128.1(2)(b) (West 2010), and *In re Marriage of Rozzi*, 190 P.3d 815, 819 (Colo. Ct. App. 2008) (indicating that evidence of domestic violence could render Parenting Coordination inappropriate) *with* IDAHO R. CIV. P. 16(l) (indicating that evidence of domestic violence, as well as mental illness of chemical dependence, make Parenting Coordination a viable option).

<sup>129</sup> It may be, however, in a jurisdiction that prohibits arbitration of child custody matters. *See* discussion at Part IV.C.

<sup>130</sup> AFCC, *Guidelines*, *supra* note 9, at 169.

<sup>131</sup> *Id.* at 165.

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unwillingness to make parenting decision on their own, to comply with parenting agreements or orders, to reduce their child-related conflicts, and to protect their children from the impact of that conflict.”<sup>132</sup> Most Parenting Coordination statutes are substantively in line with the recommendations of the AFCC, requiring either consent or trial court findings as precedent to an appointment.

Typically, a Parenting Coordinator may be appointed where both parents consent to such appointment. In all states with a Parenting Coordination statute, a court may appoint a Parenting Coordinator even without the consent of both parties. However, in all but one<sup>133</sup> the court must first make some specific findings that warrant the appointment of the Parenting Coordinator. The findings required vary among the states. However, they are similar in that they all contemplate appointment of a Parenting Coordinator when, contrary to the best interests of the children involved, those children will be exposed to persistent post-divorce parental conflict without the appointment. Allowing the appointment of a Parenting Coordinator only in those circumstances and when the

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<sup>132</sup> *Id.*

<sup>133</sup> Florida is the exception. Florida’s Parenting Coordination statute is significantly less restrictive than others in that it authorizes appointment of the Parenting Coordinator on the court’s motion – that is, without the parties’ consent – yet does not set forth any specific findings that the trial court must make in order to justify the appointment without consent of the parties. FLA. STAT. ANN. § 61-125 (West 2010) (“[U]pon agreement of the parties, the court’s own motion, or the motion of a party, the court may appoint a parenting coordinator and refer the parties to parenting coordination to assist in the resolution of disputes concerning their parenting plan.”). Florida’s statute became effective on October 1, 2009. Thus, it has not yet been addressed by a Florida appellate court. Allowing appointment without consent or some findings renders the appointment vulnerable to challenge, because the rationale for the intrusion is lessened without consent or a finding that the appointment is in the best interest of the children.

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parents consent to the appointment diminishes the strength of any argument that the appointment is an improper delegation of judicial authority.

In Oklahoma, a court can appoint a Parenting Coordinator with or without consent of the parties.<sup>134</sup> For the court to appoint a Parenting Coordinator without the consent of both parties, two criteria must be satisfied. First, the court must make a finding that the case is a “high-conflict case.”<sup>135</sup> A “high-conflict case” under the Oklahoma Parenting Coordinator Act is

any action for dissolution of marriage, legal separation, paternity, or guardianship where minor children are involved and the parties demonstrate a pattern of ongoing litigation, anger and distrust, verbal abuse, physical aggression or threats of physical aggression, difficulty in communicating about and cooperating in the care of their children, or conditions that in the discretion of the court warrant the appointment of a parenting coordinator.<sup>136</sup>

Secondly, the court must also make a specific finding that the appointment of a Parenting Coordinator is in the best interest of the minor child or children involved in the case.<sup>137</sup>

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<sup>134</sup> OKLA. STAT. ANN. tit. 43, § 120.3(A) (West 2010).

<sup>135</sup> OKLA. STAT. ANN. tit. 43, § 120.3(B)(1) (West 2010)..

<sup>136</sup> OKLA. STAT. ANN. tit. 43, § 120.2(2) (West 2010)..

<sup>137</sup> OKLA. STAT. ANN. tit. 43, § 120.3(B)(2) (West 2010). North Carolina’s Parenting Coordination statute is very similar to Oklahoma’s. It allows appointment with consent of the parties and allows appointment without consent of the parties only upon specific findings that the case is “a high-conflict case” and that the appointment of the Parenting Coordinator is in the best interest of the children. N.C. GEN. STAT. ANN. § 50-91 (West 2010).

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Similarly, in Colorado, a court can appoint a Parenting Coordinator with or without consent of the parties.<sup>138</sup> Absent consent of the parties, a Colorado court may appoint a Parenting Coordinator only if the court finds that (1) the parties have “failed to adequately implement the parenting plan;” (2) mediation is inappropriate or has been attempted and was unsuccessful; and (3) the appointment of the Parenting Coordinator is in the best interest of the children.<sup>139</sup>

Likewise, in Louisiana, a Parenting Coordinator may be appointed with<sup>140</sup> or without consent of both parties. Absent consent of both parties, a Parenting Coordinator may be appointed for “good cause.”<sup>141</sup> There is “good cause” for appointing a Parenting Coordinator when a trial court determines that one or both of the parties (1) are unable or unwilling to make parenting decisions with one another without assistance of others or insistence of the court, (2) are unable or unwilling to comply with parenting agreements and orders, (3) have demonstrated an ongoing

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<sup>138</sup> COLO. REV. STAT. ANN. § 14-10-128.1 (West 2010). As discussed in *infra* Part IX, Colorado provides for appointment of a Parenting Coordinator with decision-making authority and a Parenting Coordinator without decision-making authority. A Parenting Coordinator *without* decision-making authority may be appointed without consent upon the findings discussed here. COLO. REV. STAT. ANN. § 14-10-128. 1 (West 2010). However, a Parenting Coordinator with decision-making authority can be appointed only with consent of the parties. COLO. REV. STAT. ANN. § 14-10-128.3(1) (West 2010).

<sup>139</sup> COLO. REV. STAT. ANN. § 14-10-128.1(2)(a)(I)-(III) (West 2010); *see also In re Marriage of Rozzi*, 190 P.3d 815, 819 (Colo. Ct. App. 2008) (recognizing that, if the parties do not agree to the appointment, the court must make certain findings before the appointment can be made).

<sup>140</sup> LA. REV. STAT. ANN. § 9:358.1(A) (2010) (“The court shall make the appointment on joint motion of the parties.”).

<sup>141</sup> *Id.* (“On motion of a party or on its own motion, the court may appoint a parenting coordinator in a child custody case for good cause shown if the court has previously entered a judgment establishing child custody, other than an ex parte order.”).

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pattern of unnecessary litigation, (4) refuse to communicate or have difficulty in communicating about and cooperating in the care of the children, and (5) refuse to acknowledge the right of the other parent to have and maintain a continuing relationship with the children.<sup>142</sup>

In Idaho, reference to a Parenting Coordinator may be made with the parties' consent<sup>143</sup> or when the trial court has found that either (1) the issues appear to be intractable or have been subject to frequent re-litigation, (2) the well-being of a minor child is placed at risk by the parents' inability to co-parent civilly, or (3) other exceptional circumstances require such appointment to protect the child's best interests.<sup>144</sup>

The Texas Parenting Coordination statute is more restrictive than the other Parenting Coordination statutes. Other statutes allow appointment of a Parenting Coordinator with both parents' consent even without the

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<sup>142</sup> LA. REV. STAT. ANN. § 9:358.1(A) (2010), Comment (c); Palazzolo v. Mire, 10 So. 3d 748, 779 (La. Ct. App. 2009) (citing LA. REV. STAT. ANN. § 9:358.1(A) (2010), Comment (c)).

<sup>143</sup> IDAHO R. CIV. P. 16(l)(3) ("The court, upon agreement of the parties or after having found on the record that the circumstances specified in [IDAHO R. CIV. P. 16(l)(2)] are present, may appoint a Parenting Coordinator in any action involving custody of minor children."). IDAHO CODE ANN. § 32-717D (current through the end of the 2010 Second Reg. Sess. of the 60th Legis.) provides statutory authorization for court appointment of a Parenting Coordinator. However, criteria and standards for qualifications, selection, appointment, termination of appointment, and duties and responsibilities of a Parenting Coordinator are set forth by the Idaho Supreme Court, *id.*, which the court has done in IDAHO R. CIV. P. 16.

<sup>144</sup> IDAHO R. CIV. P. 16(l). Arizona similarly provides that a court may appointing a Parenting Coordinator if the court finds any of the following: (1) that the parents are persistently in conflict with one another; (2) a history of substance abuse by either parent or family violence; (3) that there are serious concerns about the mental health or behavior of either parent; (4) that a child has special needs; or (5) that it would otherwise be in the children's best interests to appoint the parenting coordinator. ARIZ. R. FAM. L. PROC. 74.

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trial court finding that, for example, the parents are high conflict or that appointment is in the “best interest of the children.”<sup>145</sup> The Texas statute prohibits appointment even with consent of the parties unless the trial court makes certain findings. Under the Texas statute, the court “*may not* appoint a parenting coordinator *unless* the court makes specific findings that” (1) the case is a high-conflict case or there is good cause shown for the appointment and (2) the appointment is in the best interest of any minor child in the suit.<sup>146</sup>

California is also restrictive regarding when a Parenting Coordinator<sup>147</sup> can be appointed. Whereas Texas requires a trial court’s findings (consent of the parents alone will not suffice), California requires consent from the parents (trial court findings alone will not suffice). In California, Parenting Coordination may be used only when the parties consent.<sup>148</sup> Parenting Coordination was at one

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<sup>145</sup> See, e.g., COLO. REV. STAT. ANN. § 14-10-128.1 (West 2010) (requiring a trial court to make findings absent agreement of the parties); OKLA. STAT. ANN. tit. 43, § 120.3(B) (West 2010) (requiring a trial court to make findings if a party objects); ARIZ. R. FAM. L. PROC. 74(A) (“parents may agree to use a Parenting Coordinator . . . subject to approval by the court”); LA. REV. STAT. ANN. § 9:358.1(A) (2010) (“The court shall make the appointment on joint motion of the parties.”)

<sup>146</sup> TEX. FAM. CODE ANN. § 153.605(b) (Vernon 2009) (emphasis added).

<sup>147</sup> AFCC, *Implementation Issues*, *supra* note 3, at 537 (stating that Parenting Coordination in California is not called “Parenting Coordination;” professionals who fulfill the Parenting Coordinator role are called “special masters.”). The statute that is relied upon as providing authority for the Parenting Coordination role is California’s special master statute, *id.*, which has broader application than just to Parenting Coordination. See CAL. EVID. CODE § 730 (West 2011).

<sup>148</sup> *Ruisi v. Thieriot*, 62 Cal. Rptr. 2d 766 (Cal. Ct. App. 1997). Although the holding of *Ruisi v. Thieriot* might be interpreted more narrowly, courts have subsequently interpreted it as a bar to appointment without the consent of both parties. AFCC, *Implementation Issues*, *supra* note 3, at 537; Coates et al., *supra* note 3,

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time widely used in California without consent, although has never been authorized by statute. However, once a court addressed the issue, it was determined that Parenting Coordination could not occur without consent of the parties.<sup>149</sup> The appointment depends on California's special master statute, which does not allow reference to a special master to the extent needed to fulfill the role of Parenting Coordination without consent of the parties.<sup>150</sup> For example, a Parenting Coordinator must necessarily interpret existing court orders. The court viewed interpretation of existing orders as a question of law, which cannot be referred to a special master without consent.<sup>151</sup> Appointment of a Parenting Coordinator also assumes that the Parenting Coordinator will address disputes that are, at the time of the appointment, unknown. California's special master statute, however, does not provide authority to refer unknown future disputes to a special master.<sup>152</sup> Thus, the court determined that the appointment of a Parenting Coordinator, who would interpret a court order and address future disputes, could not stand without consent of the parties.<sup>153</sup> The California situation demonstrates that, when the authority to appoint a Parenting Coordinator is lacking, circumstances surrounding the Parenting Coordinator's appointment and role must be adjusted to compensate for the lack of authority.

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at 249.

<sup>149</sup> *Ruisi*, 62 Cal. Rptr. 2d 766; AFCC, *Implementation Issues*, *supra* note 3, at 537.

<sup>150</sup> *Ruisi*, 62 Cal. Rptr. 2d at 774 (stating that the distinction between reference to a special master with consent and reference without consent is "carefully preserved in the statutes in order to comply with the constitutional mandate").

<sup>151</sup> *Id.* ("The trial court has no authority to refer questions of law. . . . Disputes involving interpretation of the existing custody orders, for example, may present questions of law.").

<sup>152</sup> *Id.* ("The trial court has no authority to compel a reference of unknown future disputes.").

<sup>153</sup> *Id.*

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Where the parties consent to the appointment, their ground for objection to the appointment is not well-founded. Even where parties do not consent to the appointment, if the trial court has made specific findings to justify the appointment, such as a finding that the parents are in high conflict or that the appointment of the Parenting Coordinator is in the best interest of the children, the additional intrusion into the family by appointing a Parenting Coordinator may be justified. However, as demonstrated by the California example, without an enabling rule or statute, this is less likely to be true. Thus, a court seeking to appoint a Parenting Coordinator with or without an enabling statute is well advised to condition appointment of a Parenting Coordinator on either the consent of the parties or some factual findings of the trial court that would justify appointment of the Parenting Coordinator.

### IX. Limitation on Parenting Coordination: Review by Appointing Trial Court

The appointment of a Parenting Coordinator is more likely to constitute an improper delegation of judicial authority if the Parenting Coordinator exercises decision-making authority because decision making is the essence of the judicial power.<sup>154</sup> However, as discussed in Part V above, the practical benefits of Parenting Coordination dissipate as the Parenting Coordinator's decision-making authority decreases. Thus, jurisdictions seeking to implement an effective Parenting Coordination program must find a balance. To maximize the benefits of Parenting Coordination, the Parenting Coordinator should have some degree of decision-making authority; on the other hand, the Parenting Coordinator cannot be granted so much decision-making authority that the grant constitutes an improper

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<sup>154</sup> See *supra* note 71.



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delegation of judicial authority. There must be adequate opportunity for review by the trial court.

Assigning the *final* decision-making authority to a Parenting Coordinator is an improper delegation of judicial authority; the parties must have the opportunity for the trial court to review any decision of the Parenting Coordinator. On the other hand, if the Parenting Coordinator's decision has no binding effect and is subject to a lengthy and tedious review process, one of the primary benefits of Parenting Coordination – expeditious resolution of conflict – is sacrificed. Thus, a legal and effective Parenting Coordination program must strike a balance between review that is adequate but is not so burdensome as to render Parenting Coordination futile.

### A. Review Required

Of the six states with a statute or court rule that allows a Parenting Coordinator to have decision-making authority,<sup>155</sup> five of them require that the Parenting Coordinator's decision be subject to review by the trial court. The statutes or court rules of three of them – Arizona,<sup>156</sup> Colorado,<sup>157</sup> and North Carolina<sup>158</sup> – provide a

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<sup>155</sup> Arizona, Colorado, Florida, Idaho, North Carolina, and Oklahoma have statutes or court rules allowing for decision-making by the Parenting Coordinator. Louisiana, Oregon, Texas, and Vermont have Parenting Coordination statutes, but they do not allow for decision-making authority.

<sup>156</sup> In Arizona, a Parenting Coordinator may make a decision only when a “short-term, emerging, and time sensitive situation or dispute” arises that requires an “immediate decision for the welfare of the children and parties.” ARIZ. R. FAM. L. PROC. 74(G). In that situation, the Parenting Coordinator's decision is temporary but binding. *Id.* It is, however, subject to review and entry of an appropriate order at “the judge's earliest opportunity.” *Id.*

<sup>157</sup> COLO. REV. STAT. ANN. § 14-10-128.3(1) (West 2010). Colorado allows the appointment of “decision-maker” upon consent of the parties. *Id.* The decision-maker has “binding authority” to resolve

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mechanism for judicial review of the Parenting Coordinator's decision. Although Idaho's rule<sup>159</sup> and Oklahoma's statute<sup>160</sup> do not specifically provide a

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disputes regarding implementation or clarification of a preexisting court order. *Id.* His decisions are immediately effective. *Id.* § 14-10-128.3(3). However, a party may request that the trial court modify the decision-maker's decision after a de novo hearing. *Id.* § 14-10-128.3(4)(a). The court has discretion as to whether to grant the de novo hearing. *See id.* § 14-10-128.3(4)(b).

<sup>158</sup> North Carolina's Parenting Coordination statute allows the court to authorize the Parenting Coordinator to "decide issues regarding the implementation of the parenting plan that are not specifically governed by the court order and which the parties are unable to resolve." N.C. GEN. STAT. ANN. § 50-92 (West 2010). The Parenting Coordinator's decision is binding until court review, but the parties may request an "expedited hearing" to review a Parenting Coordinator's decision. *Id.* § 50-92(b) (West 2010).

<sup>159</sup> Idaho Rule of Civil Procedure 16 makes clear that the appointment of a Parenting Coordinator does not "divest the court of its exclusive jurisdiction to determine fundamental issues of custody, visitation, and support...." IDAHO R. CIV. P. 16(l)(5). However, it also allows the Parenting Coordinator to make some decisions. *See, e.g.,* IDAHO R. CIV. P. 16(l)(1) (stating that the Parenting Coordinator "will make decisions or recommendations as may be appropriate when the parties are unable to do so"). While the trial court may designate that some decisions of the Parenting Coordinator shall be reviewed by the court before taking effect, Rule 16 does not specifically provide that any and all decisions of the Parenting Coordinator may be reviewed by the trial court. However, the Idaho Supreme Court clarified in *Hausladen v. Knoche*, that the language of Rule 16 does not give a Parenting Coordinator judicial powers of decision making. 235 P.3d 399, 403 (Idaho 2010). Instead, "the judicial function of final decision-maker remains with the court and is not delegated." *Id.*

<sup>160</sup> The Oklahoma Parenting Coordination statute, similar to the Idaho Rule, *see supra* note 153, specifically states that the appointment of a Parenting Coordinator does not "divest the court of its exclusive jurisdiction to determine fundamental issues of custody, visitation, and support . . . ." OKLA. STAT. ANN. tit. 43, § 120.3 (West Supp. 2011)). However, the Oklahoma statute also allows the Parenting Coordinator to make some decisions, *id.* § 120.3(A) (allowing appointment of a Parenting Coordinator to "decide disputed issues"), some of which shall be reviewed by the trial court before taking effect. *Id.* §

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mechanism for review therein, appellate courts of those states have held that the Parenting Coordinator's decision must be reviewed by the trial court.<sup>161</sup>

Challenges to the appointment of a Parenting Coordinator as an improper delegation of judicial authority have been successful to the extent that the Parenting

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120.3(C)(3). However, the Oklahoma statute does not specifically provide that all decisions of a Parenting Coordinator are reviewable; nevertheless, the Oklahoma Court of Civil Appeals has held that a Parenting Coordinator's decision is conditional and temporary subject to the court's review, noting that the trial court has the "ultimate responsibility" as the arbiter of a child's best interest in custody matters." *Fultz v. Smith*, 97 P.3d 651, 655 (Okla. Civ. App. 2004).

<sup>161</sup> Florida is the only state whose statute provides for a Parenting Coordinator to have decision-making authority but does not yet require the opportunity for judicial review of the Parenting Coordinator's decision. Florida's Parenting Coordination statute appears to allow the Parenting Coordinator to have decision-making authority. FLA. STAT. ANN. § 61.125(1) (West Supp. 2011) (allowing the Parenting Coordinator to "with the prior approval of the parents and the court, mak[e] limited decisions within the scope of the court's order"). However, the statute provides no mechanism for judicial review of the Parenting Coordinator's decision. *See id.* § 61.125. However, Florida's statute has been effective since only October 1, 2009, and no Florida appellate court has yet considered the issue. It is likely that a Florida court considering the issue would hold that the Parenting Coordinator's decision is not immune from judicial review. *Cf. Martin v. Martin*, 734 So. 2d 1133, 1136 (Fla. Dist. Ct. App. 1999) (holding that a court order allowing a mediator absolute authority to establish a visitation schedule for the parties must be stricken because the trial court could not "delegate its judicial authority to ultimately resolve the issue and settle disputes between the parties"). *Martin v. Martin* might, however, be distinguishable from a Parenting Coordination case that may appear before a Florida court in that the decision of the mediator in *Martin* initially resolved the conflict whereas a Parenting Coordinator's decision should be limited to resolving conflicts regarding a preexisting court order. *See Martin*, 734 So. 2d 1133. Nonetheless, a holding that the Parenting Coordinator's decision is completely immune from review would be inconsistent with the decisions of other jurisdictions addressing the same question. *See, e.g., Hausladen* 235 P.3d at 403; *Fultz*, 97 P.3d at 655.

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Coordinator's decision was perceived to be final – not subject to court review. A Parenting Coordinator's decision should be subject to court review even where the parties consent to the Parenting Coordinator's authority to make a decision that is not reviewable by the court.<sup>162</sup>

None of the five states discussed above that require review by the trial court of any decision by the Parenting Coordinator have considered the question of whether a party could *agree* to the Parenting Coordinator's decision being final – in other words, waive the right to review by the trial court. However, it is the court's role to ultimately safeguard the best interest of the children.<sup>163</sup> Thus, abrogation of that responsibility to any non-judicial designee is probably not proper, be it by statute, by the court's own decision, or by agreement of the parties.

In a state with a Parenting Coordination statute that does not provide for decision-making authority, it has been held that consent of the parties could not permit a Parenting Coordinator to have decision-making authority *without* court review; however, consent of the parties could permit a Parenting Coordinator to have decision-making authority

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<sup>162</sup> Another consideration not addressed in this Article is what the standard of review for a Parenting Coordinator's decision should be. At least one court has indicated that it should be de novo. *See Fultz*, 97 P.3d at 654 (“The Act, in our view, clearly anticipates the trial court's de novo consideration of all the facts and circumstances of the case . . .”). Review is de novo by statute in Colorado. *See supra* note 157.

<sup>163</sup> *See, e.g., Martin v. Martin*, 734 So. 2d 1133, 1136 (Fla. Ct. App. 1999) (“While a trial court can order the parties to mediate the issue of visitation, it cannot delegate its judicial authority to ultimately resolve the issue and settle disputes.”); *Kilpatrick v. Kilpatrick*, 198 P.3d 406, 410 (Okla. Civ. App. 2008) (“Requiring [the Parenting Coordinator's] recommendations to be viewed ‘as orders of the Court’ constitutes an improper delegation of judicial power to the parenting coordinator and is contrary to the parents’ due process rights under the Oklahoma and U.S. Constitutions.” (citing *Conaghan v. Riverfield Country Day School*, 163 P.3d 557 (Okla. 2007))).

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with court review.<sup>164</sup> In *Heinonen v. Heinonen*,<sup>165</sup> the Oregon Court of Appeals held that a trial court cannot delegate final decision-making authority to a Parenting Coordinator, even with consent of the parties.<sup>166</sup> In *Heinonen*, the parties entered into an agreement that allowed the Parenting Coordinator to make decisions but did not provide for the trial court's review of that decision. Instead, the agreement provided that issues such as visitation conflicts, interpretation of the clauses of the parties' divorce decree, and scheduling conflicts not anticipated by the decree "shall be within the province of the [Parenting Coordinator] to resolve."<sup>167</sup> The Oregon Court of Appeals determined that allowing the Parenting Coordinator to make a final decision would deprive the trial court of its statutorily-mandated authority to determine issues of child custody and visitation time as well as the modification thereof.<sup>168</sup> An Oregon trial court's authority is "wholly statutory," and no statute authorizes the trial court to delegate that authority to a Parenting Coordinator.<sup>169</sup> Thus, the delegation of final decision-making authority was impermissible even though the parties had agreed to it. The court further reasoned that the delegation would conflict with the legislature's policy that the court develop a parenting plan and that the court

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<sup>164</sup> *Heinonen v. Heinonen*, 14 P.3d 96 (Or. Ct. App. 2000).

<sup>165</sup> *Id.*

<sup>166</sup> The Oregon statute does not use the term "Parenting Coordinator," but allows a court to appoint one to serve in that role. *See* OR. REV. STAT. ANN. § 107.425(3)(a) (West 2010) (stating that a court may "appoint an individual or a panel or may designate a program to assist the court in creating parenting plans or resolving disputes regarding parenting time and to assist parents in creating and implementing parenting plans").

<sup>167</sup> *Heinonen*, 14 P.3d at 97.

<sup>168</sup> *Id.* at 99.

<sup>169</sup> *Id.*; *see also supra* note 63.

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modify custody and visitation in the best interest of the children.<sup>170</sup>

However, in a later case, where the trial court would review the Parenting Coordinator's decision – the trial court had the *ultimate* decision-making authority – the Oregon court held that the trial court could delegate *initial* decision-making authority to the Parenting Coordinator.<sup>171</sup> In *Polacek v. Polacek*,<sup>172</sup> the parties entered into an agreement to allow visitation “only as recommended by” the Parenting Coordinator.<sup>173</sup> However, the agreement also stated that a party had the option to challenge an adverse recommendation and that the final decision rested with the court.<sup>174</sup> The Oregon Court of Appeals held that that agreement did not improperly delegate authority of the court to a non-judicial designee because the *final* decision rested with the court.<sup>175</sup>

### B. Binding or Stayed Pending Review

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<sup>170</sup> The court did note, however, that nothing would prevent the parties from entering into an agreement to use a mediator or arbitration to reach a joint agreement as a result thereof and to stipulate into court their joint decision. *Heinonen*, 14 P.3d at 99 n.3. However, whether such a stipulation should be incorporated remains within the providence of the court to decide. *Id.* It would still be within the role of the court to ensure that the parties' agreement is consistent with the best interest of the child. *Id.*

<sup>171</sup> *Polacek v. Polacek*, 222 P.3d 732 (Or. Ct. App. 2009).

<sup>172</sup> *Id.*

<sup>173</sup> The recommendations were actually made by the child's therapist. “Parenting Coordinator” is used here for consistency. *See supra* note 166 and accompanying text explaining that Oregon's statute does not use the term “Parenting Coordinator,” yet allows the court to appoint someone to serve in that role; *see also* Kirkland, *PC Laws, Rules and Regulations*, *supra* note 8 (discussing problems regarding inconsistency of nomenclature across jurisdictions).

<sup>174</sup> *Polacek*, 222 P.3d, at 735.

<sup>175</sup> *Id.*

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Another consideration is whether the Parenting Coordinator's reviewable decision is immediately effective or is stayed until a prescribed time period for "appeal" to the trial court has expired or the trial court has reviewed the Parenting Coordinator's decision. It could be argued that, where a Parenting Coordinator's decision is immediately effective, it has the force and effect of a trial court order, if only for a short time. In some circumstances, that "interim" decision could effectively be the final decision. For example, if a Parenting Coordinator makes a decision regarding an upcoming visitation weekend and that weekend comes and goes before the trial court review. In such a situation, the Parenting Coordinator's decision-making authority is arguably an improper delegation of judicial authority.

The Oklahoma Parenting Coordination statute provides that certain types of decisions made by a Parenting Coordinator are "immediately effective" and some require court approval before coming into effect.<sup>176</sup> Perhaps somewhat contrary to its own statute, which allow some decisions to be effective without review, the Oklahoma Court of Civil Appeals has held that treating a Parenting Coordinator's recommendation as an "order of the court" constitutes an improper delegation of judicial

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<sup>176</sup>OKLA. STAT. ANN. tit. 43, § 120.3(C) (West 2010) (providing that a court order appointing a Parenting Coordinator shall specify which "determinations will be immediately effective and which will require an opportunity for court review prior to taking effect"). Idaho's Parenting Coordination rule also provides that some types of Parenting Coordinator decisions are effective without previous court review. IDAHO R. CIV. P. 16(l)(8) (stating "decisions with respect to matters submitted under [Rule 16(l)] 5(B) will be effective when communicated to the parties. Recommendations under [Rule 16(l)] 5(C) will be effective fourteen (14) days after submission to the court.") The North Carolina statute provides the same, but allows for a party to petition the court for "expedited" review. N.C. GEN. STAT. ANN. § 50-92(b) (West 2010).

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power to the Parenting Coordinator.<sup>177</sup> In some circumstances, an immediately effective recommendation, although subject to review, could be the functional equivalent of an order of the court.<sup>178</sup> Thus, allowing the Parenting Coordinator to make such a determination may actually constitute an improper delegation of judicial authority.<sup>179</sup>

A Kentucky court has impliedly rejected a similar argument.<sup>180</sup> In *Telek v. Bucher*, a father argued that the appointment of a Parenting Coordinator was essentially an order to participate in binding arbitration and that the appointment constituted an improper delegation of judicial authority to a third party.<sup>181</sup> The trial court had ordered the

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<sup>177</sup> Kilpatrick v. Kilpatrick, 198 P.3d 406, 410 (Okla. Civ. App. 2009). Although the *Kilpatrick* court did not directly address the provision of the Parenting Coordinator statute that allows for a court order to designate certain parts of a Parenting Coordinator's recommendations to be "immediately effective," the court said that requiring the Parenting Coordinator's recommendations to be viewed "'as orders of the Court' constitutes an improper delegation of judicial power to the parenting coordinator, and is contrary to the parents' due process rights under the Oklahoma and U.S. Constitutions."

<sup>178</sup> See, e.g., hypothetical at *supra* p. 401.

<sup>179</sup> See *Fultz v. Smith*, 97 P.3d 651, 654 (Okla. Civ. App. 2004) (stating that the Act clearly makes any decision of the Parenting Coordinator "conditional and temporary subject to the court's review on timely objection."). However, that seems to disregard the language of the Oklahoma statute that allows at least some decision of the Parenting Coordinator to be immediately binding, at least until court review, which will apparently take about twenty days.

<sup>180</sup> *Telek v. Bucher*, No. 2008-CA-002149-ME, 2010 WL 1253473 (Ky. Ct. App. Apr. 2, 2010).

<sup>181</sup> *Id.* at \*5. A similar argument was rejected by a Tennessee court. *Nesbitt v. Nesbitt*, No. M2006-02645-COA-R3-CV, 2009 WL 112538 (Tenn. Ct. App. Jan. 14, 2009). The wife in *Nesbitt* argued that the Parenting Coordinator was a "substitute Judge who is authorized to make recommendations, effective immediately as Orders, which violate the most fundamental constitutional rights." *Id.* at \*6 (quoting the wife's argument). The appellate court, however, interpreted the order appointing the Parenting Coordinator as simply allowing the Parenting



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parties to “participate in Parenting Coordination.”<sup>182</sup> The father argued the process was essentially binding arbitration because he was forced to abide by the Parenting Coordinator’s determination to which he objected during the period of time that it would take to obtain a final decision from the court.<sup>183</sup>

The court did not squarely address the father’s argument. Instead, it was convinced that the Parenting Coordinator was “simply supervising the court’s orders” to ensure that the terms of its orders are carried out.<sup>184</sup> The court emphasized that the Parenting Coordinator is to make a decision that complies with the pre-existing orders of the court and that such decisions are to be made only in instances where the parties cannot reach an agreement.<sup>185</sup> In addition, where a party disagrees with the Parenting Coordinator’s determination, he can seek a final determination from the court.<sup>186</sup> Because the Parenting Coordinator would make decisions that were consistent with the court’s order and the trial court could review the decision, the court was not apparently troubled by the fact that the parties would be bound by the Parenting Coordinator’s decisions in the interim.<sup>187</sup>

## C. Expediency

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Coordinator to make recommendations, not decisions, and thus did not find the Parenting Coordinator’s responsibilities to impose on the court’s authority. *Id.*

<sup>182</sup> *Telek*, 2010 WL 1253473 at \*5. The court described a Parenting Coordination as “a type of counseling service for parents who are unable to communicate or reach agreements regarding the day-to-day custody arrangements of their children.” *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* (referring to the guardian ad litem’s argument).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

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Perhaps the court in *Telek* recognized that, if the Parenting Coordinator's decision has no binding effect, one of the primary benefits of Parenting Coordination, expeditious resolution of conflict, is sacrificed. Of course, the trial court's review must be meaningful, but the Parenting Coordination process must be meaningful as well if the process is to be useful. If a Parenting Coordinator's decision is subject to a stringent review process, its utility is questionable at best.

For example, the review provision of the Oklahoma statute discussed in Part IX.B. above appears to be inconsistent with one of the purposes of Parenting Coordination, which is to facilitate expedient conflict resolution. Although a decision of a Parenting Coordinator is binding on the parties until further order of the court,<sup>188</sup> the statute provides that decisions of the Parenting Coordinator "shall be filed with the court within twenty (20) days."<sup>189</sup> Objections to the Parenting Coordinator's decisions or recommendations should be filed within ten days,<sup>190</sup> and responses to the objections filed ten days thereafter.<sup>191</sup> Then, the court shall review the objections and responses and "thereafter enter appropriate orders."<sup>192</sup> The trial court's review of the Parenting Coordinator's recommendation or decision is de novo.<sup>193</sup> Given the period

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<sup>188</sup> OKLA. STAT. ANN. tit. 43, § 120.4(B) (West 2010) ("Any decisions made by the parenting coordinator authorized by the court order and issued pursuant to the provisions of the Parenting Coordinator Act shall be binding on the parties until further order of the court.").

<sup>189</sup> OKLA. STAT. ANN. tit. 43, § 120.4(A)

<sup>190</sup> OKLA. STAT. ANN. tit. 43, § 120.4(C)(1). The court may order objections to be filed within a different time period. *Id.*

<sup>191</sup> OKLA. STAT. ANN. tit. 43, § 120.4(C)(2).

<sup>192</sup> OKLA. STAT. ANN. tit. 43, § 120.4(D).

<sup>193</sup> *Fultz v. Smith*, 97 P.3d 651, 654 (Okla. Civ. App. 2004) ("The Act, in our view, clearly anticipates the trial court's de novo consideration of all the facts and circumstances of the case, grants discretionary authority to the trial court to accept or reject the PC's decision, and permits the trial court to enter 'an appropriate order' as the

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for objection and the de novo review, this process does not provide for particularly expedient resolution of conflict.

## D. Balance

A balance must be struck between review that is sufficiently meaningful that the Parenting Coordinator's decision-making authority does not usurp judicial powers but is sufficiently limited so that the utility of the Parenting Coordinator process is not diminished to the point of being futile. Given the fine line between "too much" and "not enough" decision-making authority, the question is raised whether the benefits of Parenting Coordination warrant walking that line. To answer that question, compare the situation of high-conflict parents with irreconcilable differences regarding a minor change to the visitation schedule for a soon-upcoming holiday with and without the benefits of a Parenting Coordinator. Would these high-conflict parents, who cannot reach an agreement *with* the assistance of the Parenting Coordinator, be better situated if they were to avoid the Parenting Coordination process altogether? The answer is probably "no."

The Parenting Coordination process provides the parents with a better possibility for resolving the conflict. Without the Parenting Coordination process, the high-conflict parents who could not reach an agreement *with* the assistance of the Parenting Coordinator are not likely to reach an agreement if left to their own devices. Instead, they will have to resort to the court and wait. They will not likely get a decision from the trial court sooner than they would have gotten a decision from a Parenting Coordinator. In contrast, with the Parenting Coordination process, the parents will have *some* decision made in a timely manner. Because it increases the likelihood of agreement and allows

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circumstances of the case warrant, whether in agreement with or contrary to the decision of the PC.").

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for expedient decisions, even with the required review, the Parenting Coordination process is superior to the alternative, a court decision that could come so late as to be meaningless.

Although one of the parties will be bound by an adverse decision until the court reviews it, one of the parties will be aggrieved and bound by the court decision if the parties were to initially go to court, assuming their issue could even get before the court in time for a meaningful decision to be made. One might argue that allowing a Parenting Coordinator's decision to be binding pending appeal, and the possibility that the matter about which the parents are in dispute may pass during the pendency, the review of the Parenting Coordinator's decision is likewise a court decision that comes so late as to be meaningless. That argument is perhaps legitimate. But, as set out above, the same is true without the Parenting Coordination process; the parties may not be able to get before a judge before the matter in dispute passes. Thus, either with or without Parenting Coordination, a decision may be made by the trial court so late that that decision is not meaningful. In contrast, with the Parenting Coordination process, there is at least some decision made by some neutral party in a manner that it sufficiently timely as to be meaningful. "Staying" the effectiveness of a Parenting Coordinator's decision until the parties can go before the court for approval undermines the role of the Parenting Coordinator, which is to facilitate expedient resolution of conflicts.

The judicial review component of the Parenting Coordination process is necessary to uphold the Parenting Coordination process. However, any decision by the Parenting Coordinator should be binding pending review in order to fulfill one of the primary purposes of Parenting Coordination: to reach decisions in a timely manner to the benefit of the parents and their children.

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### X. Further Limitations on the Parenting Coordinator's Decision-Making Authority

#### A. Consent to the Parenting Coordinator's Decision-Making Authority

Another means of protecting against a challenge to a Parenting Coordinator's decision-making authority is to require that the parties consent – beyond the mere appointment of the Parenting Coordinator – specifically to the Parenting Coordinator having decision-making authority.<sup>194</sup> Some jurisdictions allow the Parenting Coordinator to have decision-making authority only with the parties' specific consent to the Parenting Coordinator's decision-making authority. In Colorado, what it calls a "Parenting Coordinator" is not authorized to make decisions<sup>195</sup> but, in conjunction with its Parenting Coordinator statute, Colorado authorizes the appointment of a "domestic relations decision-maker" who is in essence a Parenting Coordinator with decision-making authority.<sup>196</sup> A "decision-maker" can be appointed only with the consent

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<sup>194</sup> Cf. Allison Glade Behjani, *Delegation of Judicial Authority to Experts: Professional and Constitutional Implications of Special Masters in Child-Custody Proceedings*, 2007 UTAH L. REV. 823, 835 (2007) (offering as a possible solution to constitutional problems associated with having special masters involved in custody matters allowing reference to a special master only with the parents consent to the reference).

<sup>195</sup> COLO. REV. STAT. ANN. § 14-10-128.1 (West 2010); see *In re Marriage of Dauwe*, 148 P.3d 282, 285 (Colo. App. 2006) (holding that provision of court order that purported to give the Parenting Coordinator authority to "resolve the differences between the parents when they cannot agree" granted decision-making authority to the Parenting Coordinator and was contrary to Colorado's Parenting Coordination statute).

<sup>196</sup> COLO. REV. STAT. ANN. § 14-10-128.3 (West 2010).

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of the parties.<sup>197</sup> In Florida, a court is prohibited from granting a Parenting Coordinator any decision-making authority without the consent of the parties.<sup>198</sup>

In Oregon, even though the Parenting Coordination statute does not provide for the Parenting Coordinator to have decision-making authority, a court has allowed a Parenting Coordinator to make decisions if the parties consent to it. Oregon's Parenting Coordination statute<sup>199</sup> does not grant the Parenting Coordinator decision-making authority; however, in *Polacek v. Polacek*,<sup>200</sup> the parties agreed to allow visitation "only as recommended by" the Parenting Coordinator<sup>201</sup> and the court upheld this decision-making authority because, in part, of the parties' consent to that authority.<sup>202</sup>

Pennsylvania, which does not have a Parenting Coordination statute, has also allowed the use of a Parenting Coordinator to make decisions with the consent of the parties. In *Yates v. Yates*, the trial court delegated to the Parenting Coordinator "only ancillary custody disputes, such as determining temporary variances in the custody schedule, exchanging information and communication, and coordinating [the child's] recreational and extracurricular

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<sup>197</sup> *Id.* ("at any time after the entry of an order concerning parental responsibilities and upon written consent of both parties, the court may appoint a qualified domestic relations decision-maker and grant to the decision-maker binding authority to resolve disputes between the parties as to implementation or clarification of existing orders. . .").

<sup>198</sup> FLA. STAT. ANN. § 61.125 (West 2010) (allowing the Parenting Coordinator to, "with the prior approval of the parents and the court, mak[e] limited decisions within the scope of the court's order of referral").

<sup>199</sup> OR. REV. STAT. ANN. § 107.425(3)(a) (West 2010).

<sup>200</sup> *In re Marriage of Polacek*, 222 P.3d 732, 735 (Or. Ct. App. 2009).

<sup>201</sup> See *supra* note 170.

<sup>202</sup> The court's decision was also based on part on the fact that the Parenting Coordinator's decision was subject to review by the appointment trial court. See *supra* Part IX.A.

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activities.”<sup>203</sup> The Superior Court of Pennsylvania determined that allowing the Parenting Coordinator to make decisions about those issues was not an improper delegation of judicial authority in part because the parties had consented to the decision-making authority of the Parenting Coordinator.<sup>204</sup>

Requiring the parties’ consent in order for the Parenting Coordinator to have decision-making authority is not always necessary. However, such a requirement will weaken a subsequent argument that granting decision-making authority to the Parenting Coordinator was an improper delegation of judicial authority. Thus, where specific statutory or rule-based authority is lacking, such a requirement may be prudent.

### B. Limiting the Decision-Making Authority to Specific Issues

Limiting a Parenting Coordinator’s decision-making authority to very specific “minor” issues can also protect against an argument that granting the Parenting Coordinator decision-making authority is improper.<sup>205</sup> Where the issues on which a Parenting Coordinator may make a decision are minor or “ancillary” to the court’s order, his decision-making authority is less problematic.<sup>206</sup> Some statutes limit the issues on which Parenting Coordinators may have decision-making authority. Others recognize that some issues should not be decided by a Parenting Coordinator but leaves it for a trial court to

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<sup>203</sup> *Yates v. Yates*, 963 A.2d 535, 540 (Pa. Super. Ct. 2008).

<sup>204</sup> *Id.*

<sup>205</sup> See Behjani, *supra* note 194, at 835 (offering as a possible solution to constitutional problems associated with having special masters involved in custody matters allowing reference to a special master only regarding “small factual disputes”).

<sup>206</sup> See, e.g., *Yates*, 963 A.2d 535.

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delineate the issues on which the Parenting Coordinator may have decision-making authority.

The Idaho Rule providing for Parenting Coordination lists matters in which a Parenting Coordinator may or may not make a decision. It gives examples, “[b]y way of illustration and not limitation,” of what matters a trial court may authorize a Parenting Coordinator to determine. A Parenting Coordinator in Idaho may be granted the authority to make decisions regarding: (1) time, place, and manner of pickup and delivery of the children; (2) child care arrangements; (3) minor alterations in parenting schedule with respect to weeknight, weekend, or holiday visitation that do not substantially alter the basic time share allocation; (4) participation by significant others and relatives in visitation; (5) first and last dates for summer visitation; (6) schedule and conditions of telephone communication with the children; (7) manner and methods by which the parties may communicate with each other; (8) approval of out-of-state travel plans; and (9) any other issues submitted for immediate determination by agreement of the parties.<sup>207</sup> In contrast, a Parenting Coordinator may not be authorized by a court order to make decisions on certain issues. On the following issues, a Parenting Coordinator may make only recommendations to the court: (1) which parent may authorize counseling or treatment for a child; (2) which parent may select a school; (3) supervision of visitation; (4) submission to a custody evaluation; (5) appointment of an attorney or guardian ad litem for a child; and (6) financial matters including child support, health insurance, allocation of dependency exemptions and other tax benefits, liability for particular expenditures for a child.<sup>208</sup>

A legislature or court rule establishing a list such as the above indicates that the rule-making body has

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<sup>207</sup> IDAHO R. CIV. P. 16(I)(5)(B).

<sup>208</sup> IDAHO R. CIV. P. 16(I)(5)(C).



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preemptively made some determination as to those kinds of issues that would constitute an unlawful delegation of judicial authority and those that would not. Another interesting aspect of Idaho's Parenting Coordinator rule is the language that prefaces the above lists and generally describes a Parenting Coordinator's decision-making authority. Idaho allows Parenting Coordinator to make decisions *only insofar as necessary to serve the best interest of the rule*. The rule provides that:

The Parenting Coordinator will make such decisions or recommendations as may be appropriate when the parties are unable to do so. The goal of the Parenting Coordinator should always be to empower the parents in developing and utilizing adaptive parenting skills so that they can resume the parenting and decision making role in regard to their own children. When it is not possible for the parents to agree, the Parenting Coordinator shall provide *only the amount of direction and service required in order to serve the best interest of the child by minimizing the degree of conflict between the parties*.<sup>209</sup>

This provision quite wisely strikes a balance: it grants Parenting Coordinator decision-making authority, thus achieving the benefits of Parenting Coordinator, but professes to go only so far as necessary to promote the best interests of the children. Thus, this limitation perhaps insulates the rule from a challenge that it improperly delegates judicial authority to a Parenting Coordinator.

Arizona's rule of court allowing for a Parenting Coordinator appointment also limits the issues on which a Parenting Coordinator may make a decision, but that limitation is to exigent circumstances. Arizona's rule does

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<sup>209</sup> IDAHO R. CIV. P. 16(l)(1) (emphasis added).

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not grant the Parenting Coordinator any decision-making authority outside of the following provision, which allows for decision making in times of exigency:

When a short-term, emerging, and time sensitive situation or dispute within the scope of authority of the Parenting Coordinator arises that requires an immediate decision for the welfare of the children and parties, a Parenting Coordinator may make a binding temporary decision.<sup>210</sup>

Like Idaho's rule, this achieves some balance of granting enough decision-making authority for effectiveness but not so much as to constitute an improper delegation of judicial authority, although in a different way.

Rather than specifying the issues on which a Parenting Coordinator may make a decision, some jurisdictions require specification, but leave it to the trial court to delineate which issues may be decided by the Parenting Coordinator. Oklahoma is one example; it provides that:

The parenting coordinator shall not make any modification to any order, judgment or decree; however, the parenting coordinator may allow the parties to make minor temporary departures from a parenting plan if authorized by the court to do so. The appointment order should specify those matters which the parenting coordinator is authorized to determine.<sup>211</sup>

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<sup>210</sup> ARIZ. R. FAM. L. P. 74(G). The decision is subject to review. *Id.* ("The decision shall be submitted to the assigned judge with a copy to the parties (or counsel, if represented) in a written report that shall document all substantive issues addressed and the basis for the decision for review and entry of any appropriate orders at the judge's earliest opportunity.").

<sup>211</sup> OKLA. STAT. ANN. tit. 43, § 120.3(C)(3) (West 2010).

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Specifically limiting the issues on which the Parenting Coordinator may make a decision is wise. Either the legislative body or court establishing the Parenting Coordination program should limit the issues, striking a balance between not allowing the Parenting Coordinator to make decisions that are invasive of the trial court's domain but are merely ancillary to the decision that the trial court has already made and allowing the Parenting Coordinator to make decisions on enough issues that his role is meaningful and provides the benefits that Parenting Coordination is intended to convey. Whether the issues on which a Parenting Coordinator may make a decision are specifically limited by statute or court rule or by the order for appointment, limiting the Parenting Coordinator's decision to issues that are ancillary to and within the scope of the already-existing trial court order is wise. Narrowing decision-making authority of the Parenting Coordinator protects against argument that it is an improper delegation of judicial authority but at the same time allows Parenting Coordination to bestow the benefits as intended.

## XI. Conclusion

Parenting Coordination has the potential to bestow substantial benefits on parents, children, and the court system. However, the appointment does pose potential problems regarding improper delegation of judicial authority. A Parenting Coordination program can be viewed as a serious governmental intrusion into the day-to-day matters of a parent-child relationship if the role is not properly circumscribed. The role should be properly limited so that Parenting Coordination can bestow the benefits that it intends but also does not constitute an improper delegation of judicial authority.

Where the parameters of the role have not been set out in advance, lawyers, and perhaps even judges, might

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not understand the Parenting Coordinator's role or how a Parenting Coordination program should operate within the existing constraints of the law. The potential misunderstanding contributes to the vulnerability of the appointment. A holding of invalidity could have implications not only for the instant appointment, but for the future of Parenting Coordination in that jurisdiction.

A jurisdiction that seeks to implement a proper and legal program, or a trial court judge who seeks to appoint a Parenting Coordinator without statutory or rule-based authority, must carefully consider limitations that are necessary or desired in the given jurisdiction so that Parenting Coordination can provide parents, children, and the state the benefits it offers. A Parenting Coordination program must achieve an appropriate balance between various legal aspects of a Parenting Coordination program including: the stage in litigation at which appointment will be allowed; under what conditions appointment will be allowed; whether the Parenting Coordinator will have decision-making authority; the reviewability of the Parenting Coordinator's decisions; and the limitations on the Parenting Coordinator's decision-making authority. Achieving the appropriate balance will mitigate the argument that the appointment is an improper delegation of judicial authority. However, the balance is a delicate one; Parenting Coordination will lose its utility if a proper balance is not achieved. For example, the Parenting Coordinator should have a sufficient degree of decision-making authority that Parenting Coordination is not merely another hoop for the parents to jump through on their way to court, yet not so much that the appointment is improper. In addition, the appointment must be limited to qualified professionals or else one of the essential components of and rationales for Parenting Coordination – guiding the parents with a goal of avoiding future conflict – is eviscerated.

Furthermore, the legal permissibility of a Parenting Coordination program will depend on whether the

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Parenting Coordinator appointment is authorized by statute, court rule, or must rest on some other authority such as the trial court's inherent authority. For example, where Parenting Coordination is specifically authorized by a state's statute, it might be properly ordered and the Parenting Coordinator might have decision-making authority without consent of the parties. In contrast, where Parenting Coordination is not authorized by a statute or court rule, a jurisdiction would be wise to allow the Parenting Coordinator to have decision-making authority only with consent of the parties. Those limitations should increase in degree where the basis for the authority is lesser in degree. Weighed against the benefits to the children of divorce, whose best interests the state is obligated to protect, and the state itself, the balance tips in favor of Parenting Coordination.

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### STUDENT ESSAY

#### **NO CHAMPION FOR CHILDREN: TENNESSEE'S RULE 40A AND THE APPOINTMENT OF GUARDIANS AD LITEM IN CUSTODY PROCEEDINGS**

*Austin Elizabeth Kupke*

#### I. Introduction

On February 17, 2009, the Tennessee Supreme Court adopted a provisional rule to be used in child custody cases in all courts in the State of Tennessee.<sup>1</sup> The rule, Rule 40A, concerns the “Appointment of Guardians Ad Litem in Custody Proceedings” and dictates the appointment, role, powers, duties, rights, limitations, and costs of guardians ad litem in limited types of cases “including but not limited to divorce, paternity, domestic violence, contested adoptions, and contested private guardianship cases.”<sup>2</sup> Rule 40A is provisional in that it was passed with the intention of it lasting only a limited time while the mechanics of the rule were evaluated and commented on by the general public and members of the bench and private bars.<sup>3</sup>

Guardians ad litem are individuals, frequently lawyers, whose “role generally is to assist the court in protecting [a] child’s best interests rather than to advocate

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<sup>1</sup> Press Release, Administrative Office of the Courts, Supreme Court Adopts Provisional Rule for *Guardians Ad Litem* in Parenting Cases (Feb. 17, 2009), <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/2009/GAL%20Provisions.pdf> (on file with author).

<sup>2</sup> TENN. SUP. CT. R. 40A.

<sup>3</sup> In Re: Tennessee Supreme Court Rule 40A (Apr. 30, 2010), <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/proposals/2009/Order%20Extending%20Comment%20Period%20and%20Exp%20Date%20of%20Rule40A.pdf> (on file with author).

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the child's wishes."<sup>4</sup> In Tennessee, guardians ad litem are appointed by the court in situations where the rights of the child cannot be fairly represented by the legal counsel of her parent(s) or the State (in dependency, neglect or child abuse cases).<sup>5</sup> Before Rule 40A was provisionally enacted, other statutory provisions guided and managed the appointment of guardians ad litem in child custody cases.<sup>6</sup> Supreme Court Rule 40 controlled child dependency, neglect, or abuse cases, and continues to control these types of cases today.<sup>7</sup>

Rule 40A was passed with the intention of reducing the number of guardians ad litem appointed by the courts and to more clearly delineate the duties of a guardian ad litem once appointed.<sup>8</sup> Additionally, the Supreme Court passed Rule 40A in an effort to control the actions of guardians ad litem and subsequently "reduce the overall costs to the parties" when a guardian ad litem becomes involved in a child custody case.<sup>9</sup> The actions taken by the Supreme Court, however, destroy the very important role of a guardian ad litem in a custody proceeding.

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<sup>4</sup> Barbara Ann Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIMONIAL L. 183, 196-97 (2005) (citing ABA Child Custody Pro Bono Project, Appointment Laws in Divorce Cases (Aug. 2003)).

<sup>5</sup> *Higgins v. Higgins*, 629 S.W.2d 20, 22 (Tenn. Ct. App. 1981); TENN. SUP. CT. R. 40. *See generally* Walton Garrett, *When Should a Guardian ad Litem be Appointed in a Custody Case?*, TENNESSEE FAMILY LAW LETTER, Nov. 1992, Vol. 7 No. 1, at 14 (hereinafter "Garrett, *When Should Guardian Ad Litem Be Appointed?*").

<sup>6</sup> *See* TENN. CODE ANN. §37-1-149 (2010); TENN. CODE ANN. §36-4-132 (2010); TENN. SUP. CT. R. 13.

<sup>7</sup> TENN. SUP. CT. R. 40; *see also* Leslie Kinkead, *Supreme Court Rule 40A-Not to be Confused with Rule 40*, TBA FAMILY SECTION NEWSLETTER (Mar. 2009), [http://www.tba.org/sections/JuvenileLaw/newsletters/juvenilelaw\\_e-news\\_032009.htm#Anchor-Fourth-11481](http://www.tba.org/sections/JuvenileLaw/newsletters/juvenilelaw_e-news_032009.htm#Anchor-Fourth-11481).

<sup>8</sup> Press Release, *supra* note 1.

<sup>9</sup> *Id.*

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This note will show that the provisional passage of Supreme Court Rule 40A was a reactionary move to limit guardians ad litem in response to a rising distrust of them in custody proceedings. The result is a rule that weakens the role of guardians ad litem and vitiates their ability to advocate for children to the extent that the position is almost moot. While the role of guardian ad litem is inherently fraught with challenging issues of definition and delegation of responsibility,<sup>10</sup> it is an essential function of the legal system and of child advocacy. Rule 40A, in all practical application, “takes the teeth” out of the guardian ad litem appointment and frustrates the representation of the party that has the most to gain or lose in custody cases: the child. If children are to have adequate protection during the trials of custody proceedings, guardians ad litem must be left with the tools necessary to advocate for them as their attorneys.

### II. Development of the Law

While children in delinquency proceedings have a due process right to legal representation in court, “the [Supreme] Court has not recognized a comparable right to counsel for children in other civil contexts.”<sup>11</sup> Many states have laws that ensure representation for children in abuse and neglect proceedings, due to the passage of federal legislation aimed at protecting children in those situations.<sup>12</sup> For child custody cases, however, the question

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<sup>10</sup> Atwood, *supra* note 4, at 183-86.

<sup>11</sup> *Id.* at 187 (referencing *In re Gault*, 387 U.S. 1 (1967)). In *In re Gault*, a juvenile was arrested and adjudicated delinquent in juvenile court without, amongst other things, counsel. The Supreme Court held that the child’s 14<sup>th</sup> Amendment rights had been violated as a result. *In re Gault*, 387 U.S. 1 (1967).

<sup>12</sup> See generally Atwood, *supra* note 4, at 188-89; Tara Lea Muhlhauser, *From “Best” to “Better”: The Interests of Children and the Role of a Guardian Ad Litem*, 66 N.D. L. REV. 633, 633-36 (1990).



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of when children need or should have legal representation is left to the discretion of the judges who oversee their cases.<sup>13</sup> Supreme Court Rule 40A is the rule that now controls this function of the legal system in Tennessee.

Before Rule 40A was passed, the Tennessee Code as well as the Tennessee Rules of Civil Procedure controlled the appointment of guardians ad litem in child custody cases.<sup>14</sup> In relevant part, Rule 17.03 of the Tennessee Rules of Civil Procedure states

[t]he court shall at any time after the filing of the complaint appoint a guardian ad litem to defend an action for an infant or incompetent person who does not have a duly appointed representative, or whenever justice requires. The court may in its discretion allow the guardian ad litem a reasonable fee for services, to be taxed as costs.<sup>15</sup>

Additionally, the Tennessee Code provides that “in an action for dissolution of marriage involving minor children, upon its own motion or upon the motion of either party, the court may appoint a guardian ad litem for any minor child of the marriage.”<sup>16</sup>

The appointment of a guardian ad litem in child custody cases arises out of the duty of a judge to rule in the best interests of a child.<sup>17</sup> Generally, because children are

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<sup>13</sup> Walton Garrett, *Representation of Children in Custody Cases*, 7 TENNESSEE FAMILY LAW LETTER, Apr. 1987, Vol. 1 No. 6, at 9 (hereinafter “Garrett, *Representation of Children*”); see Atwood, *supra* note 4, at 193.

<sup>14</sup> TENN. CODE ANN. §37-1-149 (2010); TENN. CODE ANN. §36-4-132 (2010); TENN. R. CIV. P. 17.03.

<sup>15</sup> TENN. R. CIV. P. 17.03.

<sup>16</sup> §36-4-132.

<sup>17</sup> See Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785, 1788-89 (1996) (citing *State ex rel. Bird v. Weinstock*, 864 S.W.2d 376, 384 (Mo. Ct. App. 1993)).

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not parties in custody litigation, they do not require legal representation; the presumption is that the parents are in the best position to advocate for their own child and see that his or her best interests are protected.<sup>18</sup> For this reason, Tennessee case law dating back to 1918 rejects the necessity of guardians ad litem where a parent of a child can adequately speak for the child's interests.<sup>19</sup> Without an agent like the guardian ad litem, however, the court may not always know whether it has all of the requisite information to determine which parent will provide the best care for the child, even if his or her parents are advocating for him or her.<sup>20</sup> While the parents are party to these procedures, there is a legitimate concern that the necessary information must be "untainted by the parochial interests of the parents."<sup>21</sup> Traditionally in Tennessee, in order to ensure that the proper information is garnered, the judge may in her discretion appoint a guardian ad litem.<sup>22</sup>

Case law in the state of Tennessee indicates the importance of judges utilizing their ability to appoint guardians ad litem when appropriate. In the 1981 case *Higgins v. Higgins*, the Court of Appeals of Tennessee recognized that the trial court judge had not relied upon the system of using a guardian ad litem at the trial level of a custody case.<sup>23</sup> The trial judge had refused to hear testimony from three minor children whose parents were getting divorced and arguing over their custody.<sup>24</sup> This judge awarded full custody of the children to their father, with whom the two daughters had considerable trouble

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<sup>18</sup> Garrett, *Representation of Children*, *supra* note 13, at 9.

<sup>19</sup> Kenner v. Kenner, 201 S.W. 779, 783 (Tenn. 1918).

<sup>20</sup> Stuckey, *supra* note 17, at 1788-89.

<sup>21</sup> *Id.*

<sup>22</sup> See Garrett, *When Should Guardian Ad Litem Be Appointed?*, *supra* at 14; see also TENN. CODE ANN. §37-1-149 (2010); TENN. CODE ANN. §36-4-132 (2010); TENN. R. CIV. P. 17.03.

<sup>23</sup> *Higgins*, 629 S.W.2d at 22.

<sup>24</sup> *Id.*

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living.<sup>25</sup> On appeal, the custody decision was reversed. The appellate opinion acknowledged the trial judge's "commendable desire to protect [the children]" from testifying on their behalves but nonetheless found that "the rights of the children were not properly represented" by their parents whose "intensely hostile attitudes" prevented them from being sufficient advocates.<sup>26</sup> The appellate court called for a complete evidentiary retrial with instruction to appoint a guardian ad litem for the children so that their best interests would be protected.<sup>27</sup> Such precedent makes clear the importance of children having a voice in the legal arena of custody battles.

When a guardian ad litem is appointed, the costs incurred are generally to be billed as court costs to the parties to the legal suit.<sup>28</sup> Rule 17.03 of the Tennessee Rules of Civil Procedure dictates that the fee for guardians ad litem should be "reasonable."<sup>29</sup> In Tennessee, courts have often looked to Tennessee Supreme Court Rule 8, Rule of Professional Conduct Rule 1.5 for determining what constitutes a "reasonable" fee for a guardian ad litem, directing the court to consider such factors as "time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly," as well as "the fee customarily charged in the locality for similar services."<sup>30</sup>

In *Keisling v. Keisling*, which was decided in 2005, the court turned to another Tennessee case from 1980, *Connors v. Connors*, to determine a reasonable fee for a

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> JANET LEACH RICHARDS, RICHARDS ON TENNESSEE FAMILY LAW §8-7 (Matthew Bender 3d ed. 2008) (1997). In some counties, however retainers are paid up front.

<sup>29</sup> TENN. R. CIV. P. 17.03.

<sup>30</sup> TENN. SUP. CT. R. 8, RPC 1.5.

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guardian ad litem.<sup>31</sup> There, trial judge appointed the guardian ad litem in the Keislings' case due to the "animosity" between the parents; this judge recused herself during the trial, however, and was replaced by a judge who immediately indicated skepticism towards the need for the guardian ad litem's appointment.<sup>32</sup> This judge held that the guardian ad litem would only receive the \$1,500 as compensation even though her billed amount was \$15,825.<sup>33</sup> This was in part due to accusations that the guardian ad litem had "charged an excessive rate" and had not conducted the duties the family or the court expected of a guardian ad litem.<sup>34</sup>

The appellate court remanded the issue of the guardian ad litem's compensation to the trial court with instructions to follow *Connors* and Tennessee Supreme Court Rule 8, Rule of Professional Conduct 1.5.<sup>35</sup> The judge explained that serving as a guardian ad litem "is often a difficult and delicate task" and that the guardian ad litem must be "afford[ed] ... leeway to investigate" what the best interests of a child might be.<sup>36</sup> Still, the judge cautioned, the potential for abuse of discretion, "as where the guardian ad litem undertakes tasks or assumes a role that is overly-expansive"<sup>37</sup> is considerable, and that discretion must be kept in check.

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<sup>31</sup> *Keisling v. Keisling*, 196 S.W.3d 703, 729-30 (Tenn. Ct. App. 2005) (citing *Connors v. Connors*, 594 S.W.2d 672 (Tenn. 1980)).

<sup>32</sup> *Id.* at 726-27. "The Court is going to treat you as counsel for the children.... There's a vast difference between a guardian ad litem on the one hand and counsel for the children on the other hand . . . I have no interest in your duties as guardian ad litem, not at all, but I do have some interest in your duty as counsel for the children." *Id.* (quoting J. Inman).

<sup>33</sup> *Id.* at 727-28.

<sup>34</sup> *Id.* at 728.

<sup>35</sup> *Id.* at 731.

<sup>36</sup> *Id.* at 730.

<sup>37</sup> *Keisling*, 196 S.W.3d at 730.

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The *Keisling* case illustrates two important issues in the appointment of guardians ad litem in child custody cases: defining reasonable compensation and establishing what the appropriate boundaries are for guardians ad litem. Supreme Court Rule 40A was developed with these two concerns in mind.

Before Rule 40A, Rule 40 was the only Supreme Court Rule managing the appointment of guardians ad litem, but the rule was explicitly limited to juvenile court neglect, abuse, and dependency proceedings.<sup>38</sup> Rule 40A was passed under the authority of Tennessee Rules of Appellate Procedure Rule 1, which defines the scope of the Rules of Appellate Procedure.<sup>39</sup> The Advisory Comment to Rule 1 explains that under the Tennessee Code §16-3-402—§16-3-407, and §16-3-601, the Supreme Court of Tennessee is empowered to establish “rules of practice and procedure in all courts” of Tennessee.<sup>40</sup> The Tennessee Supreme Court may maintain control over procedure in the court system as a part of the separation of powers doctrine, which is included in the Tennessee Constitution.<sup>41</sup> According to Buck Lewis, the President of the Tennessee Bar Association, Rule 40A was enacted by the Tennessee Supreme Court because “using guardian ad litem[s] [sic] in litigation is really more of a court (or) judicial function...the court wanted to have an opportunity to express itself on the issue.”<sup>42</sup>

Rule 40A was adopted as a provisional rule with original effective dates of May 1, 2009 through April 30,

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<sup>38</sup> TENN. SUP. CT. R. 40.

<sup>39</sup> TENN. R. APP. P. 1.

<sup>40</sup> *Id.* at Advisory Comment (referencing TENN. CODE ANN. §16-3-402—§16-3-407 (2009), and TENN. CODE ANN. §16-3-601 (2009)).

<sup>41</sup> TENN. CONST. art. II, §1.

<sup>42</sup> Bill Dries, *High Court Takes a Conservative Stance on GALs*, MEMPHIS DAILY NEWS, Feb. 26, 2009, <http://www.memphisdailynews.com/editorial/Article.aspx?id=41081> (quoting Buck Lewis, President of the Tennessee Bar Association).

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2010, which was intended as a time to solicit comments “regarding the operation, effect, and efficacy of this rule.”<sup>43</sup> On April 30, 2010, the date the rule was set to expire, the court issued an order extending the effective date of the rule until December 31, 2010 and asking “the bench, the bar, and the public” to submit written comments regarding Rule 40A to a clerk of the Tennessee Appellate courts.<sup>44</sup> In August of 2010, the Tennessee Supreme Court established a Rule 40A Work Group to parse the provisional rule and consider the written comments that were received in response to the court’s solicitation for comment.<sup>45</sup> The Work Group submitted a report of their findings on December 15, 2010, as a new proposed Rule 40A that addressed some of the group’s concerns.<sup>46</sup> On December 21, 2010 the Tennessee Supreme Court again extended the effective date of Rule 40A.<sup>47</sup> Finally, the court filed another order explaining the progress of the rule and again extending the deadline for the rule “until further notice of the Court” on January 21, 2011.<sup>48</sup> The court, in conjunction with the order, posted the Work Group’s proposed revision of 40A.<sup>49</sup> The purpose of this order was to extend the period for public comment until March 14, 2011 so that the

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<sup>43</sup> TENN. SUP. CT. R. 40A §12.

<sup>44</sup> In Re: Tennessee Supreme Court Rule 40A (Apr. 30, 2010), <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/proposals/2009/Order%20Extending%20Comment%20Period%20and%20Exp%20Date%20of%20Rule40A.pdf> (on file with author).

<sup>45</sup> Press Release, *supra* note 1.

<sup>46</sup> *Id.*

<sup>47</sup> In Re: Tennessee Supreme Court Rule 40A (Dec. 21, 2010), <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/2009/Order%20Extending%20Eff%20Date%20Rule%2040A.pdf> (on file with author).

<sup>48</sup> In Re: Tennessee Supreme Court Rule 40A (Jan. 21, 2011), <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/2009/Rule%2040A.%20Final%20Comment%20and%20Extension%20Order.1.21.11.pdf> (on file with author).

<sup>49</sup> *Id.*

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bench, bar, and public could respond to the Work Group's proposed rule.<sup>50</sup>

The response to Rule 40A in the past few years is reflected in the comments received by the court since the original rule was passed in February of 2009. These comments, which are on the Tennessee Supreme Court's website, indicate what the future of Rule 40A might look like.

### III. Current Policy

*Keisling*, discussed above, is one of many cases in Tennessee that indicate the tension that can arise when the duties of a guardian ad litem are not elucidated. The language of the release by the Administrative Office of the Courts dated February 17, 2009 that accompanied the adoption of Rule 40A makes clear that 40A was passed in an effort to gain control of certain by-products of guardian ad litem appointments. The release quotes Tennessee Supreme Court Justice Janice Holder as saying "[t]he guidelines outlined in Rule 40A should result in a reduction of the frequency of appointments of guardians ad litem...[and] give those appointed as GALs clearer direction about the duties a GAL must perform as well as limitations on a GAL's involvement in a case."<sup>51</sup> Justice Holder also states that Rule 40A "should reduce the overall costs to the parties of a GAL's involvement in their case."<sup>52</sup>

To these ends, Rule 40A contains language that restricts the appointments of guardians ad litem in custody proceedings. Section 3 of Rule 40A urges that "[c]ourts should not routinely appoint guardians ad litem in custody proceedings. Rather, the court's discretion to appoint

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<sup>50</sup> *Id.*

<sup>51</sup> Press Release, *supra* note 1.

<sup>52</sup> *Id.*

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guardians ad litem shall be exercised sparingly.”<sup>53</sup> Some have conjectured that this provision was a response to a contention that guardians ad litem “were being used excessively” and that “there was an appearance the Judges were simply rubber stamping the Guardians Ad Litem opinions.”<sup>54</sup> One response<sup>55</sup> to the limitations of Section 3, which guides guardian ad litem appointments, is that it conflicts directly with the discretion of the judge as outlined in the Supreme Court’s very own Rule 13, which dictates that the court “*shall*” appoint a guardian ad litem in proceedings to terminate parental rights.<sup>56</sup>

In addition to limitations on the appointment of guardians ad litem, there is the most drastic, and most criticized, alteration to the traditional role of guardians ad litem: Section 9. Section 9 controls “Participation in Proceeding” and radically changes the abilities of guardians ad litem in practice.<sup>57</sup> Traditionally “[a]t trial the guardian ad litem functions as if the child had party status ... [h]e or she may make opening and closing statements, call, examine, and cross-examine witnesses and make motions.”<sup>58</sup> Under the proposed Rule 40A, however, Section 9(a)(4) provides that “a guardian ad litem may not

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<sup>53</sup> TENN. SUP. CT. R. 40A §3(b).

<sup>54</sup> David E. Caywood, TBA Family Section Newsletter, New Guardian Ad Litem Rule 40A (Mar. 2010), [http://www.tba.org/Sections/FamilyLaw/newsletters/Family\\_032010.htm](http://www.tba.org/Sections/FamilyLaw/newsletters/Family_032010.htm).

<sup>55</sup> Comment from Williamson County Bar Association, Inc. in response to call for comment on Rule 40A (Feb. 24, 2010), <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/2009/Comments-SC%20Rule40A.pdf> (on file with author).

<sup>56</sup> TENN. SUP. CT. R. 13 §1(d)(2)(D) (mistakenly cited in comment as Supreme Court Rule 17(d)(2)(D)) (emphasis added). This provision also violates judicial discretion per the Tennessee Code and the Tennessee Rules of Appellate Procedure. TENN. CODE ANN. §36-4-132 (2010); TENN. R. CIV. P. 17.03.

<sup>57</sup> Caywood, *supra* note 54.

<sup>58</sup> Garrett, *Representation of Children*, *supra* note 13, at 10.



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take any action that may be taken only by an attorney representing a party[;]" this includes "making opening and closing statements, examining witnesses in court, and engaging in formal discovery."<sup>59</sup>

Many of the comments received in response to Rule 40A express concern about the tension the rule creates between a lawyer's ethical duty to represent his or her client adequately and the parameters of the guardian ad litem created by Rule 40A. The Williamson Bar Association reacted to Rule 40A with concern, stating "[a]n attorney appointed as a guardian ad litem can only carry out their [sic] duty if sufficiently empowered to protect a child's best interest."<sup>60</sup> Yet others reacted to the provisional rule with appreciation for tighter restrictions on the role of guardians ad litem. In the words of one private investigator who specializes in domestic cases and child custody, guardians ad litem pre-Rule 40A would "abuse" their positions, which in his opinion they frequently did not understand or fulfill.<sup>61</sup> Rule 40A, according to him and another handful of commenters, appropriately limits the guardian ad litem's ability to frustrate child custody proceedings.<sup>62</sup>

### IV. Analysis

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<sup>59</sup> TENN. SUP. CT. R. 40A §9(a)(4).

<sup>60</sup> Comment from Williamson County Bar Association, Inc. in response to call for comment on Rule 40A (Nov. 18, 2010), <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/2009/Comments-SC%20Rule40A.pdf> (on file with author).

<sup>61</sup> Comment from Mitchell E. Davis in response to call for comment on Rule 40A (Nov. 18, 2010), <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/2009/Comments-SC%20Rule40A.pdf> (on file with author).

<sup>62</sup> *Id.*

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There is some support to indicate that the creation of Rule 40A was a “push back” of sorts against guardians ad litem following certain legislative and judicial events. One highly publicized Tennessee case in 2007, *In re Adoption of A.M.H.*, involved a young Chinese-American girl whose foster parents sought to terminate her biological parents’ parental rights and adopt her.<sup>63</sup> The case went to the Tennessee Supreme Court, where Justice Barker’s opinion openly criticized the guardian ad litem in the case, casting doubt on her basis for decisions concerning the child and her handling of the relationship between the biological parents and their daughter.<sup>64</sup>

Another case decided at the trial court level before the passage of Rule 40A was *Andrews v. Andrews*, in which a couple engaged in a bitter divorce suit had a guardian ad litem appointed whose costs over the course of her representation of the child added up to over \$160,000.<sup>65</sup> The case was decided at the trial level in December 2008, and the opinion of the judge decries the “weighty” part that the guardian ad litem played throughout the divorce proceedings.<sup>66</sup> In the appellate opinion, decided after the

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<sup>63</sup> *In re Adoption of A.M.H.*, 215 S.W.3d 793 (Tenn. 2007); see also Dries, *supra* note 42.

<sup>64</sup> *In re A.M.H.* at 803-804. The Court here rejected the foster parents’ argument that irreparable damage to the child’s relationship to her biological parents had occurred due to the length of time since she had seen them, lamenting “the only evidence of substantial harm arises from the delay caused by protracted litigation and the failure of the court system to protect the parent-child relationship throughout the proceedings.” *Id.* at 812. See also Bad Cop News, The Supreme Court Scolds Judge Robert L. Childers Instead of Removing Him from the Bench (Jan. 28, 2007),

<http://badcopnews.wordpress.com/2007/01/28/tennessee-supreme-court-scolds-judge-robert-l-childers-instead-of-removing-him-from-the-bench/>.

<sup>65</sup> *Andrews v. Andrews*, No. W2009-00161-COA-R3-CV, 2010 Tenn. App. LEXIS 553, \*35 (Tenn. Ct. App. Aug. 31, 2010).

<sup>66</sup> *Id.* at \*67.

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adoption of Rule 40A, the court affirmed the trial court's ruling awarding the guardian ad litem only \$7,500, a fraction of what she charged and, having the benefit of Rule 40A, makes a point to reference Rule 40A in so ruling.<sup>67</sup>

In addition to these two cases heard directly before the passage of Rule 40A and regarding the over-involvement and costly services of guardians ad litem, the House of Representatives in Tennessee was also busy with the roles of guardians ad litem.<sup>68</sup> In 2007 and 2008, Tennessee's General Assembly introduced two bills that automatically appointed guardians ad litem for children in custody proceedings, and two bills were introduced that aimed at delineating the roles and costs of guardians ad litem.<sup>69</sup> Rule 40A was therefore introduced at a time when the Tennessee legislature was already taking action to address some of the complicated nuances of the role of guardians ad litem.

There is no doubt that the role of the guardian ad litem is difficult to navigate. At the most basic level a guardian ad litem can be described as an "investigator, champion, and monitor."<sup>70</sup> While the fluidity of the guardian ad litem role makes it difficult to define and has led to some unfortunate results, there is no reason to, as one

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<sup>67</sup> *Id.* at n.31.

<sup>68</sup> Dries, *supra* note 42.

<sup>69</sup> H.B. 319, 105th Gen. Assem., Reg. Sess. (Tenn. 2007), 2007 Bill Text TN H.B. 319 (LEXIS); H.B. 2820, 105th Gen. Assem., 2d Sess. (Tenn. 2008), 2007 Bill Text TN H.B. 2820 (LEXIS); H.B. 3284, 105th Gen. Assem., 2d Sess. (Tenn. 2008), 2007 Bill Text H.B. 3284 (LEXIS); H.B. 2904, 105th Gen. Assem., 2d Sess. (Tenn. 2008), 2007 Bill Text H.B. 2904 (LEXIS).

<sup>70</sup> Muhlhauser, *supra* note 12, at 638 (citing Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 CAL. W.L. REV. 16, 28-30 (1976); Guggenheim, *The Right to be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 100 (1984) (citation errors are the author's)).

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commenter on Rule 40A says, “thr[o]w the baby out with the bathwater.”<sup>71</sup> While the Supreme Court has a vested interest in seeing that all functions of the court operate justly and efficiently, and Rule 40A was an attempt to remedy some of the problems that had been brought to the Court’s attention, the effect of Rule 40A is that children have no advocate to speak for their interests in those instances where parents are too embroiled in their own disagreements to know what is best for the child.

Rule 40A, Section 3 weakens the power and responsibility of judges in custody cases, where traditionally it has been solely within their discretion to recognize the situations where the child needs representation. Rule 40A, Section 4, which concerns how guardians ad litem are appointed, gives parties to the suit the power to appeal the appointment of a guardian ad litem.<sup>72</sup> This provision frustrates the discretion of the court by allowing parties who the judge may feel cannot represent the interests of the child to challenge that judge’s appointment. If efficiency is truly a goal of Rule 40A, this section also allows for a process that can take days as parties file motions to have the appointment of a guardian ad litem struck down.<sup>73</sup> Finally, the language of Rule 40A, Section 3 does not leave enough to the discretion of the judge. The rule provides sixteen suggested conditions for when a guardian ad litem may be considered,<sup>74</sup> with no language giving the judge the discretion to find

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<sup>71</sup> Comment from Andrew Cate et al. in response to call for comment on Rule 40A (Nov. 18, 2010), <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/2009/Comments-SC%20Rule40A.pdf> (on file with author).

<sup>72</sup> TENN. SUP. CT. R. 40A §4(e).

<sup>73</sup> Comment from Hickman County Bar in response to call for comment on Rule 40A (Feb. 24, 2010), <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/2009/Comments-SC%20Rule40A.pdf> (on file with author).

<sup>74</sup> TENN. SUP. CT. R. 40A §3(c).

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appointment otherwise appropriate. In giving such specific instances, the challenge to the appointment of a guardian ad litem is too easily made.

Most harmful to children, however, is Section 9 of Rule 40A. Not only is the guardian ad litem prevented from calling witnesses or filing motions, but the report of the guardian ad litem, which traditionally has been provided to the court after the guardian ad litem has done an investigation into the best interests of the child, “shall not be provided to the court” unless the parents to the suit consent.<sup>75</sup> It is easy to envision the situation where both parents see unfavorable or embarrassing information in the guardian ad litem’s report, perhaps particularly in the circumstances where the report and representation for the child is most needed, and thus refuse to consent to the report being submitted to the court. Without this report, the guardian ad litem has absolutely no means of presenting the child’s best interest to the court.

The guardian cannot call witnesses such a psychologist or teacher, and cannot speak in court unless called as a witness by one of the parties,<sup>76</sup> who again, may wish to limit the voice of this neutral third party who has had access to their child. Even if the guardian ad litem is called as a witness, he or she is still prohibited from relaying information obtained from third parties due to inadmissibility of hearsay evidence.<sup>77</sup> Without the ability to file motions on behalf of children in custody settings, even when the guardian ad litem is aware of something that must be done for his or her client, he or she must appeal to one party’s attorney or the other, nullifying the neutrality that a guardian ad litem should have in custody proceedings.<sup>78</sup>

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<sup>75</sup> TENN. SUP. CT. R. 40A §9(d).

<sup>76</sup> TENN. SUP. CT. R. 40A §9(f).

<sup>77</sup> *Id.*; *Toms v. Toms*, 98 S.W.3d 140, 144 (Tenn. 2003).

<sup>78</sup> Comment from Linda B. Hall in response to call for comment on Rule 40A (Nov. 29, 2010),

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The revisions proposed by the Rule 40A Work Group cut back some of the restrictions that Rule 40A placed on the role of the guardian ad litem. Most importantly, the proposed alterations insist on viewing a guardian ad litem as an *attorney* and not a “special master” or “witness.”<sup>79</sup> The Work Group’s directive that a guardian ad litem be a lawyer for the child ensures that the guardian ad litem can act in the child’s best interest and assuage the concerns that a child’s voice is not being heard in proceedings that drastically affect the child’s life. During a time when a child is likely be upset, nervous, and torn between the interests of his parents and his own interests, it is vital that the child have a separate entity who can advocate on the child’s behalf beyond submitting a one-dimensional report and without needing to be called as a witness whose testimony may be barred by the rules of evidence.

### V. Conclusion

In conclusion, although Rule 40A attempted to step in and control a very important function in child custody cases, the appointment of guardians ad litem, the Court took the concerns and criticisms of the position too far. The problems with Rule 40A stem from reacting too much to the “few spoiled apples” in guardian ad litem appointments, and does not consider the sensitive nature of the guardian ad litem position. While the role of guardians ad litem may need a more clearly defined position, that position must be some form of an attorney for the child, with no less than full array of powers and abilities that any attorney would have to represent his or her client. Hopefully, with further comment from the legal community, the Supreme Court

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<http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/2009/Comments-SC%20Rule40A.pdf> (on file with author).

<sup>79</sup> In Re: Tennessee Supreme Court Rule 40A, *supra* note 48, at page 9.

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will amend Rule 40A to better serve the most vulnerable party in child custody cases: the child.

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### SUPPLEMENTAL MATERIAL

#### **IN RE: TENNESSEE SUPREME COURT RULE 40A No. M2009-01926-SC-RL2-RL**

#### *The Supreme Court of Tennessee*

#### ORDER

On February 17, 2009, this Court adopted Rule 40A of the Rules of the Supreme Court of Tennessee as a provisional rule, effective from May 1, 2009 through April 30, 2010. On April 30, 2010, the Court filed an order extending the effective date of provisional Rule 40A through December 31, 2010, and soliciting written public comments concerning the provisional Rule.

On August 2, 2010, the Court filed an order appointing the Rule 40A Work Group. The order stated that the Work Group was “charged with reviewing and studying provisional Rule 40A and all public comments thereon and providing to this Court by no later than December 15, 2010, a written report containing the Work Group’s recommendations for amendments designed to improve, to clarify, or to refine the language and efficacy of Rule 40A.” On December 15, 2010, the Work Group submitted its report and recommendations to the Court.

On December 21, 2010, the Court filed an order extending the effective date of provisional Rule 40A through April 1, 2011, in order to allow the Court sufficient time to consider the Work Group’s report and recommendations. On January 19, 2011, the Work Group submitted to the Court a supplemental report, as well as several suggested modifications to its proposed revision of Rule 40A.

On January 21, 2011, the Court published the Work Group’s modified revision of Rule 40A and solicited written comments from the bench, the bar, and the public. In that order the Court also extended the effective date of



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provisional Rule 40A until further order of the Court. The deadline for submitting written comments was March 14, 2011.

After considering all of the written comments received during this process, and after considering the Rule 40A Work Group's original report and recommendations, and the Work Group's supplemental report, the Court hereby adopts amended Rule 40A as set out in the attached Appendix to this order. The original version of Rule 40A was adopted as a provisional rule. The revised Rule 40A set out in the Appendix is adopted as a permanent rule. The revised rule shall take effect on September 1, 2011, and shall apply to all proceedings pending on or filed after the effective date.

The Court expresses its gratitude to the members of the Rule 40A Work Group for their invaluable service to the judiciary and to the public in the development of the revised rule. The Court also acknowledges the important contributions made by those who submitted written comments concerning the proposed revisions. Although the Court did not incorporate into the revised rule the substance of all the individual comments submitted during the public-comment periods, all of the comments assisted the Court in its consideration of the various aspects of the proposed revisions.

The Clerk shall provide a copy of this order to LexisNexis and to Thomson Reuters. In addition, this order shall be posted on the Tennessee Supreme Court's website.

IT IS SO ORDERED.

PER CURIAM

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### APPENDIX

#### Amended Rule 40A, Rules of the Tennessee Supreme Court

#### Rule 40A. Appointment of Guardians ad Litem in Custody Proceedings

##### SECTION 1. DEFINITIONS

(a) “Custody proceeding” means a court proceeding, other than an abuse or neglect proceeding, in which legal or physical custody of, access to, or visitation or parenting time with a child is at issue, including but not limited to divorce, post divorce, paternity, domestic violence, contested adoptions, and contested private guardianship cases.

(b) “Abuse or neglect proceeding” means a court proceeding for protection of a child from abuse or neglect or a court proceeding in which termination of parental rights is at issue.

(c) “Guardian Ad Litem” means a licensed attorney appointed by the court to represent the best interests of a child or children in a custody proceeding.

##### Commentary

Under revised Rule 40A it is now possible for the same attorney who is appointed as a Rule 40 guardian ad litem to follow a case and be appointed to represent the child as a Rule 40A guardian ad litem in subsequent proceedings (e.g., a termination of parental rights case in Juvenile Court followed by a contested adoption between competing grandparents in Chancery Court).

##### SECTION 2. APPLICABILITY

This Rule applies to all guardian ad litem appointments in custody proceedings pending on or filed after the effective

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date of this Rule. On or after the effective date of this Rule, licensed attorneys appointed as guardians ad litem under the prior Rule 40A may be re-appointed under the terms of this Rule.

### SECTION 3. GUARDIAN AD LITEM APPOINTMENTS

(a) Consistent with Tennessee Code Annotated section 36-4-132, in a custody proceeding the court may appoint a guardian ad litem when the court finds that the child's best interests are not adequately protected by the parties and that separate representation of the child's best interests is necessary. Such an appointment may be made at any stage of the proceeding.

(b) Courts should not routinely appoint guardians ad litem in custody proceedings. Rather, the court's discretion to appoint guardians ad litem shall be exercised sparingly. In most instances, the child's best interests will be adequately protected by the parties.

(c) In determining whether appointing a guardian ad litem is necessary, the court should consider:

- (1) the fundamental right of parents to the care, custody, and control of their children;
- (2) the nature and adequacy of the evidence the parties likely will present;
- (3) the court's need for additional information and/or assistance;
- (4) the financial burden on the parties of appointing a guardian ad litem and the ability of the parties to pay reasonable fees to the guardian ad litem;
- (5) the cost and availability of alternative methods of obtaining the information/evidence necessary to resolve the issues in the proceeding without appointing a guardian ad litem; and
- (6) any alleged factors indicating a particularized need for the appointment of a guardian ad litem, including:

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- (i) the circumstances and needs of the child, including the child's age and developmental level;
- (ii) any desire for representation or participation expressed by the child;
- (iii) any inappropriate adult influence on or manipulation of the child;
- (iv) the likelihood that the child will be called as a witness or be questioned by the court in chambers and the need to minimize harm to the child from the processes of litigation;
- (v) any higher than normal level of acrimony indicating the parties' lack of objectivity concerning the needs and best interests of the child;
- (vi) any interference, or threatened interference, with custody, access, visitation, or parenting time, including abduction or risk of abduction of the child;
- (vii) the likelihood of a geographic relocation of the child that could substantially reduce the child's time with a parent, a sibling, or another individual with whom the child has a close relationship;
- (viii) any conduct by a party or an individual with whom a party associates which raises serious concerns for the safety of the child during periods of custody, visitation, or parenting time with that party;
- (ix) any special physical, educational, or mental-health needs of the child that require investigation or advocacy;
- (x) any dispute as to paternity of the child; and
- (xi) any other factors necessary to address the best interests of the child.

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(d) If the court concludes that appointing a guardian ad litem is necessary, the court should endeavor to appoint a person with the knowledge, skill, experience, training, education and/or any other qualifications the court finds necessary that enables the guardian ad litem to conduct a thorough and impartial investigation and effectively represent the best interests of the child.

### SECTION 4. APPOINTMENT ORDER

(a) Appointment of a guardian ad litem shall be by written order of the court.

(b) In plain language understandable to non-lawyers, the order shall set forth:

- (1) the reasons for the appointment, focusing upon the factors listed in Section 3(c) of this Rule;
- (2) the specific duties to be performed by the guardian ad litem in the case;
- (3) the deadlines for completion of these duties to the extent appropriate;
- (4) the duration of the appointment; and
- (5) the terms of compensation consistent with Section 11 of this Rule.

(c) The court shall provide in the appointment order as much detail and clarity as possible concerning the guardian ad litem's duties. Providing such specificity will assist the parties in understanding the guardian ad litem's role and will enable the court to exercise effective oversight of the guardian ad litem's role.

(d) There is no right to a peremptory challenge of a guardian ad litem. Allegations that a guardian ad litem appointment is unnecessary, that a particular appointee is unqualified or otherwise unsuitable, or that an appointee is or has become biased should be raised without delay and should be addressed by trial courts through motion practice. Any appeal from a trial court's decision on such a motion shall be prosecuted pursuant to Tennessee Rules of Appellate Procedure 9 and 10.

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### Commentary

The omission of the original Section 4(d) (conflicts of interests) from revised Rule 40A does not mean that a guardian ad litem may ignore a conflict of interest. On the contrary, a guardian ad litem who runs afoul of the conflict-of-interest provisions of the Rules of Professional Conduct is subject to appropriate disciplinary action.

### SECTION 5. DURATION OF APPOINTMENT

Appointment of a guardian ad litem continues in effect only for the duration provided in the appointment order or any subsequent order. If no order specifies the duration of the appointment, the appointment shall terminate automatically when the trial court order or judgment disposing of the custody or modification proceeding becomes final.

### SECTION 6. ROLE OF GUARDIAN AD LITEM

(a) The role of the guardian ad litem is to represent the child's best interests by gathering facts and presenting facts for the court's consideration subject to the Tennessee Rules of Evidence. (See Section 8 of this Rule.)

(b) The guardian ad litem shall not function as a special master for the court or perform any other judicial or quasi-judicial responsibilities.

### SECTION 7. ACCESS TO CHILD AND INFORMATION RELATING TO CHILD

(a) Subject to subsections (b) and (c), when the court appoints a guardian ad litem in a custody proceeding, the court shall issue an order, with notice to all parties, authorizing the guardian ad litem to have access to:

- (1) the child, without the presence of any other person unless otherwise ordered by the court, and
- (2) confidential information regarding the child, including the child's educational, medical, and mental health records, any agency or court files involving allegations of abuse or neglect of the

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child, any delinquency records involving the child, and other information relevant to the issues in the proceeding.

(b) A child's record that is privileged or confidential under law other than this Rule may be released to a guardian ad litem only in accordance with that law, including any requirements in that law for notice and opportunity to object to release of records. Information that is privileged under the attorney-client relationship may not be disclosed except as otherwise permitted by law of this state other than this Rule.

(c) An order issued pursuant to subsection (a) must require that a guardian ad litem maintain the confidentiality of information released, except as necessary for the resolution of the issues in the proceeding. The court may impose in an order of access any other condition or limitation that is required by law, rules of professional conduct, the child's needs, or the circumstances of the proceeding.

### SECTION 8. DUTIES/RIGHTS OF GUARDIAN AD LITEM

(a) The guardian ad litem shall satisfy the duties and responsibilities of the appointment in an unbiased, objective, and fair manner.

(b) A guardian ad litem shall:

(1) conduct an investigation to the extent that the guardian ad litem considers necessary to determine the best interests of the child, which can include, but is not limited, to ascertaining:

- (i) the child's emotional needs, such as nurturance, trust, affection, security, achievement, and encouragement;
- (ii) the child's social needs;
- (iii) the child's educational needs;
- (iv) the child's vulnerability and dependence upon others;

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- (v) the child's need for stability of placement;
  - (vi) the child's age and developmental level, including his or her sense of time;
  - (vii) the general preference of a child to live with known people, to continue normal activities, and to avoid moving;
  - (viii) the love, affection and emotional ties existing between the child and the parents;
  - (ix) the importance of continuity in the child's life;
  - (x) the home, school and community record of the child;
  - (xi) the willingness and ability of the proposed or potential caretakers to facilitate and encourage close and continuing relationships between the child and other persons in the child's life with whom the child has or desires to have a positive relationship, including siblings; and
  - (xii) the list of factors set forth in Tenn. Code Ann. § 36-6-106.
- (2) obtain and review copies of the child's relevant medical, psychological, and school records as provided by Section 7.
- (3) within a reasonable time after the appointment, interview:
- (i) the child in a developmentally appropriate manner, if the child is four years of age or older;
  - (ii) each person who has significant knowledge of the child's history and condition, including any foster parent of the child; and
  - (iii) the parties to the suit;



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- (4) if the child is twelve (12) years of age or older, seek to elicit in a developmentally appropriate manner the reasonable preference of the child;
  - (5) consider the child's expressed objectives without being bound by those objectives;
  - (6) encourage settlement of the issues related to the child and the use of alternative forms of dispute resolution; and
  - (7) perform any specific task directed by the court.
- (c) If the child asks the guardian ad litem to advocate a position that the guardian ad litem believes is not in the child's best interest, the guardian ad litem shall:
- (1) fully investigate all of the circumstances relevant to the child's position, identify every reasonable argument that could be made in favor of the child's position, and identify all the factual support for the child's position;
  - (2) discuss fully with the child and make sure that the child understands the different options or positions that might be available, including the potential benefits of each option or position, the potential risks of each option or position, and the likelihood of prevailing on each option or position.
  - (3) if, after fully investigating and advising the child, the child continues to urge the guardian ad litem to take a position that the guardian ad litem believes is contrary to the child's best interest, the guardian shall take all reasonable steps to:
    - (i) subpoena any witnesses and ensure the production of documents and other evidence that might tend to support the child's position; and
    - (ii) advise the court at the hearing of the wishes of the child and of the witnesses subpoenaed and other evidence available for the court to consider in support of the child's position.

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### SECTION 9. PARTICIPATION IN PROCEEDING

A guardian ad litem appointed in a custody proceeding is entitled to all rights and privileges accorded to an attorney representing a party, including but not limited to the right to:

- (a) receive a copy of each pleading or other record filed with the court in the proceeding;
- (b) receive notice of, attend, and participate in each hearing in the proceeding, including alternative dispute resolution proceedings, and take any action that may be taken by an attorney representing a party pursuant to the Rules of Civil Procedure.

#### Commentary

Current Rule 40A differs from the prior rule in that the guardian ad litem now functions as a lawyer, not as a witness or special master. The guardian ad litem does not prepare a report for the parties or the court, nor does the guardian ad litem make a recommendation to the parties or the court concerning custody. Specifically:

- (1) A guardian ad litem may not be a witness or testify in any proceeding in which he or she serves as guardian ad litem, except in those extraordinary circumstances specified by Supreme Court Rule 8, Rule of Professional Conduct 3.7.
- (2) A guardian ad litem is not a special master, and should not submit a “report and recommendations” to the court but may file a pre-trial brief/memorandum as any attorney in any other case. The guardian ad litem may advocate the position that serves the best interest of the child by performing the functions of an attorney, including but not limited to those enumerated in Supreme Court Rule 40(d)(7).
- (3) The guardian ad litem must present the results of his or her investigation and the conclusion regarding the child’s best interest in the same

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manner as any other lawyer presents his or her case on behalf of a client: by calling, examining and cross examining witnesses, submitting and responding to other evidence in conformance with the rules of evidence, and making oral and written arguments based on the evidence that has been or is expected to be presented.

### SECTION 10. EXPEDITING CUSTODY PROCEEDINGS

To the extent possible, courts shall expedite custody proceedings in which guardians ad litem have been appointed, using available technological and electronic means to speed the process and to minimize costs.

### SECTION 11. GUARDIAN AD LITEM FEES AND EXPENSES

(a) The guardian ad litem shall be compensated for fees and expenses in an amount the court determines is reasonable. In determining whether the guardian ad litem's fees and expenses are reasonable, the court shall consider the following factors:

- (1) the time expended by the guardian;
- (2) the contentiousness of the litigation;
- (3) the complexity of the issues before the court;
- (4) the expenses reasonably incurred by the guardian;
- (5) the financial ability of each party to pay fees and costs;
- (6) the fee customarily charged in the locality for similar services; and
- (7) any other factors the court considers necessary.

(b) Concerning the allocation of the fee among the parties, the court may do one or more of the following:

- (1) order a deposit to be made into an account designated by the court for the use and benefit of the guardian ad litem;

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- (2) before the final hearing, order an amount in addition to the amount ordered deposited under paragraph (1) to be paid into the account;
  - (3) equitably allocate fees and expenses among the parties; and
  - (4) reallocate the fees and expenses at the conclusion of the custody proceeding, in the court's discretion, if the initial allocation of guardian ad litem fees and/or expenses among the parties has become inequitable as a result of the income and financial resources available to the parties, the conduct of the parties during the custody proceeding, or any other similar reason. Any reallocation shall be included in the court's final order in the custody proceeding and shall be supported by findings of fact.
- (c) The appointment order shall specify the hourly rate to be paid to the guardian ad litem. If an initial deposit is deemed appropriate by the trial court, the appointment order shall state the amount of deposit, the date of deposit, and the account or location in which the deposit shall be made. The order shall also state whether periodic payments may be drawn from the initial deposit.
- (d) If an initial deposit is required and the trial court deems that periodic payments may be drawn from the initial deposit, the trial court shall:
- (1) provide the manner in which withdrawals may be made;
  - (2) require notice to the parties of the withdrawal, including a statement of services rendered, supported by an affidavit; and
  - (3) provide a reasonable opportunity to object to the fees charged before the withdrawal is made.
- (e) To receive payment under this section beyond the amount in the initial deposit, if any, the guardian ad litem must complete and file with the court a written claim for payment, whether interim or final, justifying the fees and

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expenses charged and supported by an affidavit. Any objection to the guardian ad litem's fee claim shall be filed within fifteen days after the claim is filed.

(f) Failure to object to a statement regarding periodic payments does not constitute a waiver of any objection to the reasonableness of the guardian ad litem's total fees. The guardian ad litem shall file a final written claim for payment within thirty days of the entry of the final order. Any objection must be filed within fifteen days after the guardian ad litem's final written claim for payment is filed.

(g) If no objection is timely filed, the court shall file a written order approving the claim, or portion thereof, determined to be reasonable and related to the duties of the guardian ad litem.

(h) If an objection is timely filed, the court shall conduct a hearing and thereafter file a written order denying the claim, or approving the claim, or portion thereof, determined to be reasonable and related to the duties of the guardian ad litem.

(i) The guardian ad litem must seek court approval before incurring extraordinary expenses, such as expert witness fees. Any order authorizing the guardian ad litem to hire expert witnesses must specify the hourly rate to be paid the expert witness, the maximum fee that may be incurred without further authorization from the court, how the fee will be allocated between the parties, and when payment is due.

### SECTION 12. APPEALS BY GUARDIAN AD LITEM

The guardian ad litem shall not initiate an appeal. Notwithstanding the foregoing sentence, the guardian ad litem may appeal the trial court's ruling on any matter adjudicated under Section 4(d) and also may appeal the trial court's ruling following a hearing specified in Section 11(h). Upon appeal of the matter by one of the parties, however, the guardian ad litem shall have the right to receive notice of the appeal and may participate in the

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appeal as any other party, including but not limited to, filing briefs, motions and making oral arguments.

### SECTION 13. EFFECTIVE DATE

The original version of this rule was adopted as a provisional rule and governed all custody proceedings, as defined in Section 1(a) of the rule, from May 1, 2009, through August 31, 2011. This revised rule is adopted as a permanent rule. The revised rule shall take effect on September 1, 2011, and shall apply to all proceedings pending on or filed after the effective date.

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